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MONTANA ADMINISTRATIVE PROCEDURES
STUDY. Part I, Report of study on
Montana administrative procedures
and proposal for a Montana Adminis-
trative procedure act

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ON

MONTANA ADMINISTRATIVE PROCEDURES

AND

PROPOSAL FOR A MONTANA ADMINISTRATIVE PROCEDURE ACT

Submitted to:

Montana Legislative Council

By:

John P. McCrory

2
JUNE
1971

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ADMINISTRATIVE PROCEDURE STUDY

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I.

INTRODUCTION

The 41st Session of the Montana Legislature passed the following joint resolution:

A JOINT RESOLUTION OF THE SENATE AND HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING THAT THE LEGISLATIVE COUNCIL CONDUCT A STUDY OF THE FEASIBILITY AND DESIRABILITY OF AN ADMINISTRATIVE PROCEDURES ACT AND REPORT ITS FINDINGS TO THE FORTY-SECOND LEGISLATIVE ASSEMBLY.

WHEREAS, the grant of rule-making authority, which is quasi-legislative power, to administrative agencies in Montana has been broad in the past, and

WHEREAS, the grant of power to hold administrative hearings, which is quasi-judicial power, to administrative agencies in Montana has also been broad in the past, and

WHEREAS, the broad grants of quasi-legislative and quasi-judicial power to administrative agencies make it increasingly important that the rights of citizens affected by actions and decisions of administrative agencies be protected adequately, and

WHEREAS, at the present time there is wide disparity in Montana statutes granting rule-making authority and authority to hold hearings to administrative agencies, and this disparity has resulted in substantial differences in the procedures used by administrative agencies for adopting rules and holding hearings, and

WHEREAS, these differences make it extremely difficult for citizens to determine what procedures are used by a particular agency, and

WHEREAS, in some instances ambiguous language in the statutes, lack of legal counsel, or both, may have inhibited administrative agencies in taking action even though that action might have been desirable, and

WHEREAS, some administrative agencies have codified their rules and procedures, but often the codification available to citizens is obsolete thus making it extremely difficult to determine what rules and procedures are in effect at any particular time, and

WHEREAS, lacking any central filing, the only method by which current rules can be obtained is by contacting the appropriate agency of state government, and

WHEREAS, because there is no central filing of administrative rules, it is extremely difficult at the present time to determine whether or not duplication or conflicts may exist in rules adopted by different administrative agencies, and

WHEREAS, the national conference of commissioners on uniform state laws has recognized the need for standardization of administrative rule-making and hearing procedures and recommend a model act in this area, and

WHEREAS, if such an act were adopted, it might be desirable to exclude certain agencies that have well defined rules and hearing procedures.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That the legislative council is requested to conduct a detailed study of the statutes granting quasi-legislative and quasi-judicial powers to administrative agencies of the state.

BE IT FURTHER RESOLVED, that the legislative council is requested to determine whether it would be feasible and desirable to adopt a uniform administrative procedure act like that recommended by the national conference of commissioners on uniform state laws.

BE IT FURTHER RESOLVED, that the legislative council consult with all state agencies which might be affected by an administrative procedure statute and, based upon the information obtained, consider the feasibility and desirability of excluding those agencies which have well defined rule-making and hearing procedures established.

BE IT FURTHER RESOLVED, that the legislative council may appoint advisory persons and groups as it deems necessary and advisable, and may also consider contracting with the university of Montana law school for the basic research necessary prior to the formulation of conclusions and recommendations.

BE IT FURTHER RESOLVED, that the legislative council is requested to prepare a written report, together with any necessary implementing legislation, for consideration by the forty-second legislative assembly.

BE IT FURTHER RESOLVED, that the secretary of state is directed to send copies of this resolution to the executive director of the legislative council and to all members of the Montana commission on uniform state laws.

Pursuant to this direction, the Legislative Council retained the author hereof to make a study of state administrative procedures, submit a report reflecting the product of that study, make recommendations with regard to the feasibility and desirability of adopting a state administrative procedure act and draft a proposed act appropriate for consideration by the Forty-second Legislative Assembly. On the basis of the study, I have concluded that the adoption of a state administrative procedure act is

not only feasible and desirable, but is also an urgent necessity.

The study of state administrative procedures was made on the basis of responses to a questionnaire submitted to agencies, evaluation of statutes and constitutional provisions creating agencies and giving them their authority, evaluation of rules and regulations adopted by agencies and supplemental inquiries made to particular agencies.

The Joint Resolution contemplates the possibility of adopting a state administrative procedure act similar to the Revised Model State Administrative Procedure Act (herein referred to as the Revised Model Act) proposed by the National Conference of Commissioners on Uniform State Laws. Accordingly, the study was conducted and the report is structured to compare state administrative procedures with the procedures provided for in the Revised Model Act. Critical functions and procedures of administrative agencies and judicial review procedures are evaluated. The report is structured to show for each: summaries of provisions of the Revised Model Act, the purpose of the provisions of the Revised Model Act, discussion of comparable state administrative procedures and recommendations for a Montana Administrative Procedure Act (herein referred to as the MPA).

Numerous sources have been drawn upon during the course of the study in addition to the Revised Model Act. They are specifically mentioned in the report of the study and, with one exception, will not be mentioned here.

It is worthy of note that previous studies have been made and previous administrative procedure bills have been submitted to the legislature. The most recent such bill was Senate Bill No. 179, submitted to the Thirty-sixth Legislative Assembly (1959). That proposal was patterned after the Model State Administrative Procedure Act (the predecessor to the Revised Model Act and herein referred to as the Model Act), but contained

modifications and additions deemed appropriate for Montana. Some of the provisions in the proposed MAPA have been patterned after Senate Bill No. 179.

The study of state administrative procedures is submitted in two parts. Part I (this volume) contains the report of the study. Attached for easy reference are copies of the proposed MAPA (Appendix I), the Revised Model Act (Appendix II), and Senate Bill No. 179 (Appendix III).

Part II of the study is a separate volume which contains the proposed MAPA. The various sections and sub-sections of the proposed act are followed by citations of comparable provisions in the Revised Model Act and Senate Bill No. 179. In addition, sections and sub-sections are followed by explanatory comments which include one or all of the following: an explanation of the provision, remarks regarding the effect that the provision would have on state administrative procedures, and an explanation of modifications of or additions to the Revised Model Act, which has been used as a pattern.

II.

THE IMPACT AND IMPORTANCE OF THE ADMINISTRATIVE PROCESS

It has been said that:

"The determinations of administrative agencies significantly affect the personal life of every citizen. Many men can avoid 'court trouble,' but few indeed can avoid the administrative agencies. Like death and taxes (both of which, incidentally, are matters of agency concern) the agencies reach everyone." 1 Cooper, State Administrative Law 3.¹

This observation is, without question, applicable to the state of Montana. Virtually no one who lives or is present in the state can escape contact with the administrative process. Administrative agencies regulate the quality of air that we breath (State Board of Health); the quality and price of the milk we drink (Milk Control Board); the quality of food that we eat (Department of Health and State Board of Food Distributors); the price at which merchandise is sold and trade practices (Montana Trade Commission); the circumstances under which we borrow money (Consumer Loan Commissioner); the cost of utilities needed for every-day existence (Public Service Commission); when and where a person may hunt and fish (Fish and Game Commission); the issuance of automobile drivers' licenses (Highway Patrol Board); the quality of many of the basic professional and occupational services which we rely upon daily; and many other things which have a very real and significant effect on our daily lives.

There are twenty-five boards which license individuals to engage in professions and occupations. For example, without a license issued by a state administrative agency a person cannot practice the following occupations and professions: real estate broker or salesman, barber, professional engineer, pharmacist, osteopath, optometrist, cosmetologist, dentist, physician, mortician, masseur,

or water well contractor (this is not an all inclusive list). These boards have power and authority to adopt rules which regulate their respective occupations or professions and to grant or deny licenses. When an application for a license is submitted, they determine if the applicant is qualified, and may issue or deny a license accordingly. Quite often the criteria for this determination includes discretionary considerations, such as judgments regarding general fitness or good moral character. The boards also have authority to determine if and when licenses should be revoked or suspended.

Other state agencies have similar functions, e.g. authority to adopt rules which regulate conduct and authority to make specific determinations regarding the application of rules and statutes in individual cases. For example, the Montana Aeronautics Commission has authority to adopt rules regulating air carriers; fixing rates, fares, charges and classifications for air carriers; issuing or denying certificates of public convenience and necessity which air carriers must have to operate within the state; and revoke, suspend or modify such certificates. R.C.M. 1947, Sect.1-323. It has similar authority and functions regarding the regulation and licensing of airports. R.C.M. 1947, Sect. 1-304 - 1-310. The State Entomologist, acting as a State Apiarist, regulates the state beekeeping industry. His powers include the authority to order the burning of infected bees, hives and equipment on five days notice. R.C.M. 1947, Sect. 82-806. The State Board of Land Commissioners is authorized to make rules regarding the use and leasing of state lands. R.C.M. 1947, Sects. 81-503, 81-423, 81-507, 81-1707, 81-1722. It also has the power to choose between competing prospective lessees who wish to use state land and to cancel leases. R.C.M. 1947, Sects. 81-8422, 81-501, 81-602, 81-1701, 81-1702.2, 81-1710, 81-1729.

In some instances, the violation of rules or orders issued by state administrative agencies is a misdemeanor, which may be punished by fine or imprisonment or both. See for example: R.C.M. 1947, Sect. 27-422 (Milk Control Board); R.C.M. 1947, Sect. 66-2613 (Water Well Contractors Examining Board); R.C.M. 1947, Sect. 28-127 (State Board of Forestry); R.C.M. 1947, Sect. 66-817 (State Examining Board of Cosmetology); R.C.M. 1947, Sect. 6613-14 (State Board of Examiners in Optometry); R.C.M. 1947, Sect. 90-188(9) (The Secretary of Agriculture as the Sealer of Weights and Measurers); and R.C.M. 1947, Sect. 46-210 (Livestock Sanitary Board). The Montana Supreme Court considered and approved the constitutionality of statutes, such as the foregoing, which permit administrative bodies to define conduct which shall constitute a crime. Bacus v. Lake County, 138 Mont. 69, 354 P 2d 1056 (1960). So long as the legislature sets the penalty, such delegations are not subject to constitutional attack.

The foregoing is a sampling which highlights the authority that administrative agencies have in Montana. In some instances the administrative authority is a single official. However, more often it is a body consisting of several members. Some agencies, such as the State Board of Health, act in a multiple capacity regulating more than one area.

III.

HISTORY AND PURPOSE OF THE REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT

The movement for reform in administrative procedures predates 1930. In 1929 the Wisconsin Legislature considered, but did not adopt, an administrative procedure act.² However, it was not until the early 1930's that the movement for reform developed momentum.

In 1933 the American Bar Association's Executive Committee appointed a Special Committee on Administrative Law, which made a series of studies and reports between 1933 and 1939. In 1939, President Roosevelt by executive order directed the appointment of the Attorney General's Committee on Administrative Procedures to study and make recommendations with regard to federal administrative procedures. In 1941 the Attorney General's Committee submitted its report which contained both majority and minority recommendations. The minority report contained a "Code of Fair Administrative Procedures," which ultimately was the basis for the Federal Administrative Procedure Act, which was adopted by Congress in 1946.

In 1937 the American Bar Association Committee on Administrative Agencies and Tribunals was created to study state administrative procedures. In 1939 the Committee submitted a proposed draft of an administrative procedure act. The proposed act was submitted to the National Conference of Commissioners on Uniform Laws for their consideration and study. It was extensively studied and revised. Revisions were made on the basis of knowledge gained from the report made by the Attorney General's Committee, the Benjamin Report on Administrative Procedures in the State of New York, which was issued in 1942,³ and other studies. In 1946, after extensive consideration, study and revision, and after Congress passed the Federal Administrative Procedure Act, the Model

State Administrative Procedure Act (herein referred to as the Model Act) was approved by the National Conference of Bar Commissioners on Uniform Laws as a guide for state legislatures.

During the period following 1946 more studies of administrative procedures were made. These include studies of federal administrative procedures by the Conference on Administrative Procedures, which was created at the direction of President Eisenhower in 1953; a second Conference, which was created at the direction of President Kennedy in 1960, and studies made by the second Hoover Commission established by Congress in 1953.

In 1958 the Commissioners appointed a committee to reconsider and revise the Model Act. On the basis of knowledge gained from experience with the Model Act and the numerous studies of administrative procedures, recommendations were made. In 1961 the Revised Model State Administrative Procedure Act (herein referred to as the Revised Model Act) was approved by the Commissioners.

More than half of the 50 states have adopted or, to some degree, patterned their state acts after the Model Act or the Revised Model Act. These states include: Arizona, Arkansas, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Virginia, Washington, West Virginia, Wisconsin, Wyoming and Vermont.⁴ States which have, within the past 10 years, adopted, or closely patterned their acts after, the Revised Model Act include: Arkansas, Florida, Georgia, Hawaii, Idaho, Louisiana, Nevada, New Mexico, Oklahoma, Rhode Island, South Dakota, West Virginia, Wyoming, and Vermont.

The majority of the remaining states have adopted administrative procedure acts. Some of these acts are patterned after the Federal Administrative Procedure Act. Only a few states do not have an administrative procedure statute of some type.⁵ New York has a statute which relates only to judicial review. However, the New York Law Revision Commission has been studying state administrative procedures since 1962 and has proposed an act which is patterned after the Revised Model Act.⁶

The foregoing summary merely highlights the efforts and energy which have been expended to develop adequate administrative procedures. Numerous other studies have been made including studies by many states which have resulted in the adoption of state administrative procedure acts. One commentator has stated that "the consideration given to the subject constitutes one of the truly massive research activities in the history of the law."⁷ For a more comprehensive discussion of the development of reform in administrative procedures see 1 Cooper, State Administrative Law 7-13; 1 Davis, Administrative Law, Sec. 1.04; and Stason, Research in Administrative Law, 16 Administrative Law Review 99-107.

As the name implies, the Revised Model Act is not intended to be a uniform act to be adopted by all states in the exact form approved by the Commissioners. Rather it is a model and it was anticipated that additions or modifications would be made to meet local conditions.

The Commissioners have made the following comment regarding the content of the Revised Model Act:

"The act deals primarily with major principles, not with minor matters of detail. Every student of administrative law recognizes that many of the procedural details involved in administrative action must necessarily vary more or less from state to state and even from agency to agency within the same state. Each state and each agency must work out these details for itself according to the necessities of the situation. However, there are certain basic principles of common sense, justice, and fairness that can

and should prevail universally. The proposed act incorporates these principles, with only enough elaboration of detail to support the essential major features.

The major principles embraced in the Act as adopted by the Conference are:

(1) Requirement that each agency shall adopt essential procedural rules, and, except in emergencies, that all rule-making, both procedural and substantive, shall be accompanied by notice to interested persons, and opportunity to submit views or information;

(2) Assurance of proper publicity for all administrative rules;

(3) Provision for advance determination of the validity of administrative rules, and for "declaratory rulings," affording advance determination of the applicability of administrative rules to particular cases;

(4) Assurance of fundamental fairness in administrative adjudicative hearings, particularly in regard to such matters as notice, rules of evidence, the taking of official notice, the exclusion of factual material not properly presented and made a part of the record, and proper separation of functions;

(5) Assurance of personal familiarity with the evidence on the part of the responsible deciding officers and agency heads in quasi-judicial cases;

(6) Provision for proper proceedings for and scope of judicial review of administrative orders, thus assuring correction of administrative errors.

There is no good reason why these general principles should not govern throughout the entire administrative structure. They are not details; they are essential safeguards of fairness in the administrative process. Yet too many state statutes are altogether deficient in regard to them.

Recent years have, however, been bringing forth in many quarters profound apprehension over the undisciplined growth of administrative powers, and this is the reason why the Congress and several state legislatures have been sufficiently concerned to take affirmative action.

The Model State Administrative Procedure Act is offered by the National Conference of Commissioners in the hope that it will serve a good purpose in states that may be considering the adoption of such legislation or the revision of acts already on the statute books. The Model Act will, of course, require

careful adjustment to the special statutory conditions peculiar to the state under consideration but the general principles set forth are of universal applicability and the suggested language will also be found helpful."

The Commissioners have further stated that the purpose of the Revised Model Act is to give "assurance...of reasonable uniformity of practice and fair procedural methods for the benefit of all persons affected by state administrative action."

IV.

COMPARISON - REVISED MODEL ACT v. STATE ADMINISTRATIVE PROCEDURES: RECOMMENDATIONS FOR A MONTANA ADMINISTRATIVE PROCEDURE ACT

A. PRELIMINARY REMARKS

Administrative procedure acts seek to establish procedures for two basic administrative functions, rule-making and adjudication. Generally, a rule is a regulation, standard, or other statement of general applicability which implements or interprets a statute or describes methods of practice and procedure before an agency. When an agency adopts or amends rules it acts as a legislature does. For this reason the function is often referred to as quasi-legislative. The fact that agencies often establish law in the exercise of this function is demonstrated by the following statement by the State Supreme Court in Montana Milk Control Board v. Community Creamery Co.:⁸

"From a reading of this statute, it is apparent that there can be no violation of the statute itself. The subsections are merely mandatory provisions to guide the Milk Control Board in promulgating their rules and regulations. A violation of fair trade occurs when a party violates properly promulgated rules and regulations of the Board, enacted pursuant to this statute. The statute was not intended to stand independently, but rather as a mandatory guide for the Milk Control Board in preparing their rules and regulations."

Rules adopted by administrative agencies have a very real effect upon individual rights and obligations. They may limit or prohibit the right to engage in a particular form of activity, require a certain course of conduct or limit the right of individuals to pursue particular occupations or professions. United States Supreme Court Chief Justice Stone, in Columbia Broadcasting System v. United States,⁹ summarized the importance and significance of this function in the following way:

"...a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails."

Rules which are dealt with in administrative procedure acts are of two types, procedural and substantive. Procedural rules are those which specify the manner in which business is conducted before an agency. They relate to such matters as the filing and processing of license applications and procedures to be followed during agency adjudication hearings. Substantive rules are those which regulate conduct by interpreting and implementing statutes in the area over which the agency has jurisdiction.

In performing the adjudication function, an agency acts as a court does, making determinations of legal rights, duties and privileges in individual cases. It makes determinations regarding facts and law. For this reason, the function is commonly referred to as quasi-judicial. In the Revised Model Act and the proposed Montana Administrative Procedure Act, it is referred to as a "contested case" function.

An example of a contested case or judicial function is a proceeding brought for the revocation of an individual's professional or occupational license, where it is alleged that the licensee has violated a statute or an agency rule. The significance of the function is demonstrated by the fact that it is recognized by state and federal courts alike that constitutional "due process" requirements must be adhered to by agencies in the exercise of this function. In other words, parties must have the same basic protections which they would have in a court of law.

B. RULE MAKING

1. Procedural Rules and Public Information

The Revised Model Act

Section 2 of the Revised Model Act (Appendix II, p. 2) provides that, in addition to other rule-making requirements imposed by law (such as the statutes granting various agencies their authority) each agency is required to:

- (1) adopt as a rule a description of its organization, stating the general course and method of its operations and the methods whereby the public may obtain information or make submissions or requests;
- (2) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency;
- (3) make available for public inspection all rules and all other written statements of policy or interpretations formulated, adopted, or used by the agency in the discharge of its functions;
- (4) make available for public inspection all final orders, decisions and opinions.

Section 2 further provides that agency rules, orders and decisions shall not be valid or effective until the foregoing public inspection requirements have been met, unless the person or party involved has actual notice thereof.

Purpose for the Requirement

Section 2 is one of the most significant provisions of the Revised Model Act. It, together with Sections 4 and 5, relating to the filing and

publication of rules, deals with one of the most troublesome problems encountered in administrative law--the lack of public information regarding the functioning of agencies, the rules which they have adopted and the decisions which they have made.

It is fundamental that a person who has business before an agency should have a reliable means of determining the procedures he must follow in order to accomplish that business. If he is seeking a license, information should be available to him so he will know the steps which must be taken and the filings which must be made to accomplish this purpose. If he is a party to a contested case hearing, the outcome of which will determine his legal rights and duties, he should be fully aware of the procedures which the agency will follow and the procedures which are available to him in defense of his position. All procedures should be a matter of public record and should be readily available to the public.

The problems which arise from the lack of information about agencies are well summarized by Cooper in his treatise on State Administrative Law:¹⁰

"The results of this lack of public information are serious. It leads to situations where those subject to an agency's jurisdiction are unable to ascertain the rules to which their conduct must conform. It leads, also, to situations where even their counsel are unable to ascertain the rules, and are thus unable to fulfill their function effectively. Counsel are unable to predict with any degree of confidence or accuracy what decision the agency would make on postulated facts; they do not know what arguments would be effective with the agency in particular case situations.

The result is, for example, that a claimant for workmen's compensation must go to a lawyer who specializes in that field and who has learned from day-by-day experience all the nuances of procedure and policy which one must know to present the claim effectively, but which a lawyer who did not specialize in that field could not ascertain. Similarly, general counsel for a corporation finding itself summoned to appear before a public service commission may well feel compelled to seek the assistance of an expert in

the affairs of that agency--and preferably a lawyer who has recently served on the commission.

This need for seeking the assistance of specialists arises, in the case of many state agencies, not from the fact that the problems involved are characterized by the baffling intricacies of the sort that typify cases considered by some of the federal agencies, but merely from the lack of public information as to the rules, decisions, and policies of the agency."

Established, recorded procedures are also of great value to agency personnel. They provide a guide for uniform treatment of all persons who appear before an agency. Without such a guide, different agency employees or members might treat the same problem in different ways. Such rules also insure continuity in the operation of agencies when there is a change in agency members and personnel.

Procedures in State Agencies

Procedural Rules

The statutes for very few state agencies require the adoption of procedural rules. Some statutes authorize, but do not require their adoption. In most cases agencies are given general rule-making authority, e.g. to adopt rules and regulations "deemed necessary to carry out the intent of the act" or similar language. In some cases, rule-making authority is not mentioned at all, but power may reasonably be inferred from the functions which the legislature has delegated to the agency. Typically, there is a lack of specific instructions regarding what should be covered by procedural rules. As a result, most agencies that fully responded to inquiries made during the study were found to have no procedural rules or procedural rules that are incomplete and inadequate. The foregoing conclusion can best be demonstrated by examining several specific agencies.

The statutes relating to the Board of Osteopathic Examiners make no reference to rule-making power. R.C.M. 1947, Sect. 66-1401 - 66-1413. However, the Board has authority to grant, deny and revoke licenses, from which such power can be implied. R.C.M. 1947, Sect. 66-1403 and 66-1409. In response to inquiries made during the study, the Board stated that it was without authority to adopt procedural rules and that it has not done so.

The Board's office is located in Great Falls, rather than the state capitol.¹¹ Since there is no procedural rule stating where applications and other submissions are to be filed, it may be difficult for a person to determine how and where to do business with the Board. The problems created by the absence of procedural rules is compounded by the fact that the statutes relating to the agency do not outline procedures for filing and processing license applications and are silent with regard to procedures to be followed in license revocation cases. With regard to the latter, there is no mention of notice or hearing.

Notice and hearing requirements are treated in the portion of this report relating to contested cases. However, it should be noted that the Montana Supreme Court has recognized this right in license revocation cases, even where there is no statutory requirement. State v. Schultz, 11 Mont. 429, 28 Pac. 643 (1892).

The State Board of Morticians has been delegated the authority to grant or deny licenses and revoke or suspend licenses. Section 66-2704 of the Revised Codes of Montana provides that the Board "may adopt and enforce rules and regulations to carry out the purposes of this act." Rules have been adopted and printed. However, they are silent as to procedures to be followed in contested cases, e.g. license revocation and suspension. They do not even outline the minimal guidelines specified

by statute. R.C.M. 1947, Sect. 66-2715. The rules are also uninformative regarding licensing procedures. There is no indication of where applications or other submissions may be filed, although the Board's office is located at Choteau, Montana.¹²

The Examining Board for Water and Waste Water Operators has licensing functions, including license revocation and suspension. R.C.M. 1947, Sects. 66-5901 - 66-5912. Section 69-5910 states:

"The board shall make such rules and regulations as are reasonably necessary to carry out the intent of this act. The rules and regulations shall include, but are not limited to, provisions in accordance with Section 69-5904, provisions establishing qualifications for applicants, procedures for examination of candidates and such other provisions as are necessary for the administration of this act."

The rules and regulations adopted by the Board, which are only available in the minutes of meetings, are lacking in specifics with regard to applications for licenses and examinations. No rules have been adopted regarding the revocation or suspension of licenses. The Board has authority to classify water treatment plants, water distribution systems and waste water treatment plants under Section 69-5404. The rules do not contain procedures for these functions.

The State Board of Medical Examiners has licensing functions for the practice of medicine and the practice of physical therapy. R.C.M. 1947, Sects. 66-1010 - 66-1049 and Sects. 66-2501 - 66-2517. With regard to the practice of medicine, Section 66-1017(1) provides that the Board:

"shall have and exercise the following powers and duties...(1) to adopt and promulgate such rules and regulations that the board may deem necessary or proper to carry out the provisions and purposes of this act..."

With regard to the practice of physical therapy, Section 66-2514 provides:

"The board is authorized to adopt reasonable rules to carry this act into effect and may amend and revoke such rules at its discretion."

Although the Board has power to grant or deny licenses and take disciplinary action, including the revocation and suspension of licenses, it has not adopted rules and regulations to implement this delegated authority. In response to an inquiry with regard to rules and regulations, the Executive Secretary of the Board indicated that extensive rules and regulations are not necessary to supplement the Medical Practice Act. He also made the following statements about rule-making and procedural rules:

"In the past the State Board of Medical Examiners has had no formally adopted set of rules and regulations. By Board action, certain policies or principles were adopted at regular Board meetings and incorporated in the minutes *** It does not appear that there is need for an extensive set of rules and regulations to supplement the Medical Practice Act. The rules and regulations will consist mostly of policy matters and interpretation. As an example, the Board recently adopted the principles of ethics of the American Medical Association as a rule or regulation. The Board is presently developing an interpretation of 'temporary licensure' which will be included in the rules and regulations. *** There will be no need for extensive rules and regulations such as the Board of Health might adopt. Licensing and disciplinary matters are decided upon an individual basis at a Board meeting with the advice of our attorney. If and when additional rules and regulations are adopted we plan to do so at a regular Board meeting with the advice and consent of our attorney and they will be recorded in the minutes."

The statutes relating to medical practice do give some direction with regard to the conduct of hearings and other contested case functions. However, they do not contain all of the "due process" protections contained in the Revised Model Act or the MAPA. The statutes relating to the practice of physical therapy refer to "due notice and hearing"; but state nothing of the procedures to be followed.

The Department of Labor and Industry has broad powers to administer and enforce the laws of the state "relating to hours of labor, conditions

of labor, prosecution of employers who default in payment of wages, protection of employees, all laws relating to child labor regulating the employment of children in any manner, and to administer the laws of the state relating to free employment offices. R.C.M. 1947, Sect. 41-1605. The Board has not adopted rules and regulations to implement any of these powers.

With regard to claims for unpaid wages, Section 41-1314.2 provides that the Commissioner of Labor and Industry:

"may maintain any proceeding appropriate to enforce the claim, including liquidated damages pursuant to this act * * * is authorized to issue, amend and enforce rules and regulations for the purpose of carrying out the provisions of this act."

The Commissioner made the following response to inquiries regarding the procedural rules:

"Authority is granted under Sections 31-1303.3, and 41-1314.1 relating to hearings for collection of wages.

No procedural rules have been formulated, and such hearings have been conducted on an informal basis, and have resulted in the acknowledgement of claims, compromise settlement, or no justification of claim."

The State Board of Equalization has the "duty" and the "power and authority" to "prescribe rules and regulations...to govern county boards of equalization and the assessors in the different counties in the performance of their duties." R.C.M. 1947, Sect. 84-708(1). It also has the duty, power and authority to "supervise" the administration of all revenue laws of the state and to assist in their enforcement." R.C.M. 1947, Sect. 84-708(6). The State Board has numerous contested case functions that it performs in its own right, including:

- (1) hearings on appeals from county boards (R.C.M. 1947, Sect. 84-709);

- (2) hearings for change of assessments (R.C.M. 1947, Sect. 84-710);
- (3) hearings for assessment of property omitted from taxation (R.C.M. 1947, Sect. 84-711);
- (4) applications and hearings for change of assessment (R.C.M. 1947, Sect. 84-722);
- (5) hearings regarding assessment of railway property (R.C.M. 1947, Sect. 84-802);
- (6) hearings regarding assessment of telegraph, telephone, electric power or transmission lines, natural gas pipelines, oil pipelines, canals, ditches, and similar property (R.C.M. 1947, Sects. 84-903 and 84-904).

The Supreme Court has held that such hearings are quasi-judicial in nature. International Business Machine Corp. v. Lewis & Clark County, 111 Mont. 384, 387; 112 P. 2d 744 (1941).

The only procedural rules that the Board has adopted are "Rules Pertaining to Hearings Held by Boards of County Commissioners and of Equalization when Sitting in Judgment of Tax Matters." No rules have been adopted regarding proceedings before the State Board. However, the Board has indicated that it follows the format of county procedures for its hearings.

There are many statutes which delegate to the Fish and Game Commission contested case hearing functions. However, the agency has not adopted procedural rules which may be used by parties in preparation for hearings. In response to inquiries about procedural rules the Commission stated:

"Procedural rules for hearing are generally adopted prior to the hearing and made part of the hearing matters."

Although there is no specific directive to the Horse Racing Commission

to adopt procedural rules and regulations, Section 62-505 of the Codes provides that the Commission shall have the duty "to prepare and promulgate a complete set of rules and regulations to govern racing meets and the pari-mutual system." The Commission has very broad authority to license race meets, regulate the conduct of race meets and license officials and employees employed at race tracks. The Commission has adopted procedural rules in some areas. However, they are, for the most part, sketchy and do not provide the minimal guidelines set forth in the Revised Model Act and the MAPA. At the present time, the Commission is in the process of revising its rules and regulations.

Section 60-132 of the Codes states that the Oil and Gas Conservation Commission "shall prescribe rules and regulations governing the practice and procedure before the commission." In response to this statutory mandate the Commission has adopted informative procedural rules.

The State Board of Public Welfare is required by statute and federal regulations to make and adopt "rules and regulations as are necessary for the prompt holding of fair hearings." R.C.M. 1947, Sects. 71-223 and 71-204; Chapter 2, Title 45, Code of Federal Regulations, Part 13. The Board has adopted comprehensive and informative rules with the aid of guidelines set forth in the Code of Federal Regulations.

Some agencies with permissive statutory language regarding procedural rules, such as the State Aeronautics Commission (R.C.M. 1947, Sect. 1-204), or with statutes that are silent, such as the Board of Architectural Examiners (R.C.M. 1947, Sects. 66-101 - 66-115), have published informative rules. However, the pattern emerges, consistent with general experience, that state agencies do a better job of informing the public of the manner

in which they function and procedures which must be followed when there is a requirement that procedural rules be adopted and there are instructions given as to the matters which should be covered in the rules.

Moreover, the lack of specific and mandatory direction has caused some misunderstanding among some agency personnel as to the extent of their authority. All agencies were asked if they had authority to adopt procedural rules. The State Board of Public Accountancy answered this inquiry in the negative, although Section 66-1815 of the Codes provides that the Board "may adopt, and amend from time to time, rules and regulations for the orderly conduct of its affairs and for the administration of this Act." The Board's rules contain only minimal mention of licensing and examination procedures and contain no procedural rules relating to license denial, revocation or suspension.

The State Entomologist is designated to act as the State Apiarist and is authorized to regulate the state's beekeeping industry. R.C.M. 1947, Sect. 82-806. He has licensing power and the power to order the transfer of colonies, the burning of infected bees and equipment and to quarantine apiaries. R.C.M. 1947, Sects. 82-806, 82-807. The State Entomologist stated in his questionnaire that he is without authority to adopt procedural rules. However, in response to other inquiries, he outlined procedures which are actually followed relating to the condemning and burning of diseased bees and equipment, and other matters which are a proper subject for procedural rules.

Public Inspection of Rules

Many agencies have printed their rules and provide copies upon request. Some agencies, such as the State Aeronautics Commission and the Oil and Gas Conservation Commission, have published rules in loose-leaf form, making

insertion of new rules and elimination of superceded rules convenient. A number of agencies periodically published booklets containing rules. Some attempt to keep the booklets up to date with paste-in sheets. Other agencies have not extracted rules from minutes of meetings at which they were adopted. While many agencies are required to keep a record of their meetings, few statutes specifically require that rules and regulations be available for inspection. The resulting problems are demonstrated by the following situations.

The Railroad and Public Service Commission last published a compilation of rules in 1948. The compilation was published in booklet form entitled "Laws, Rules and Regulations Governing Motor Vehicle Carriers (General Order M.V. No. 11)" and contains the Board's procedural rules and regulations as well as other matters. This booklet has been out of print and unavailable for distribution since before 1960. Numerous rules have been adopted by the Commission since 1948 and, as rules were adopted, efforts were made to notify all interested parties. However, there is not now available an updated compilation of the Commission's rules and regulations.

At the present time, the Commission is in the process of making such a compilation of rules. In order to ensure that it is complete, the minutes of all Commission meetings since 1948 had to be examined.

The State Board of Land Commissioners has numerous rule-making functions, including the following: rules and regulations for the appraisal of lands (R.C.M. 1947, Sect. 81-303); rules and regulations as it may deem necessary with regard to grazing and agricultural lands (R.C.M. 1947, Sect. 81-423);

rules and regulations for the State Forester with regard to the sale of timber crops and other crops of the forest (R.C.M. 1947, Sect. 81-1404); rules and regulations for the removal of dead, downed, or inferior timber from state lands (R.C.M. 1947, Sect. 81-1407); rules and regulations relating to oil and gas exploration and development on state lands (R.C.M. 1947, Sect. 81-1707); rules and regulations relating to the storage of natural gas and the sale of gas remaining in state lands in a gas field (R.C.M. 1947, Sect. 81-1727); and rules and regulations relating to the exchange of lands (R.C.M. 1947, Sect. 81-2205).

The Board has adopted numerous rules pursuant to the foregoing statutes. However, the only rules which have been compiled, published and made available for public inspection are those relating to oil and gas leases. These rules were published in booklet form in 1963 pursuant to a specific statutory requirement that such rules "shall be compiled and printed periodically" and "shall be made available to any person desiring a copy thereof at a reasonable cost to be fixed by a rule of the Board." R.C.M. 1947, Sect. 81-1707. There is no comparable requirement for other rules adopted by the Board and they are not readily available for inspection. In response to inquiries regarding the availability of the Board's rules, the Commissioner of State Lands stated:

"The State Board of Land Commissioners formulates rules through specific action on each issue which develops for their consideration at regular or special meetings. In a very real sense the Board rules are fluid. The record of Land Board policy or rules is contained in the several volumes of the official minutes of that Board. It would be beneficial to the Board, to me as administrative official, and to those affected by Land Board policies to compile a meaningful codification of policies or rules set forth by the Board over the years."

A similar response was received from the State Board of Massage Examiners:

"The rules and regulations adopted by the Board are available to the general public and interested parties. However, there are no printed or reproduced copies of such rules and regulations but

are contained in the minutes of Board meetings. All inquiries are answered by letter as to the specific rule the writer of the letter may inquire into or indicate interest in."

Other agencies have indicated that their rules are available only in minutes of meetings. These agencies include: the State Entomologist (acting as the State Apiarist), the State Board of Nursing, the State Board of Medical Examiners, the State Board of Eugenics, and the Examining Board of Water and Waste Water Operators.

MAPA Recommendations

Section 201 of the MAPA, Rules Describing Agency Organization and Procedures; Public Inspection of Rules; Model Rules (Appendix I, pp. 3-4), is patterned after Section 2 of the Revised Model Act. The basic requirements regarding adoption and public inspection of rules are the same. However, some modifications and additions have been made.

Section 2(b) of the Revised Model Act provides that rules not made available for public inspection shall not be valid or effected, absent actual knowledge to the party involved. Section 201(b) of the MAPA provides that no rule shall be effective against a person whose rights are "substantially prejudiced" by the agency's failure to conform to the public inspection requirement. This change has been made because of other differences between the Revised Model Act and the MAPA.

Under the Revised Model Act, a rule becomes effective 20 days after filing with the Secretary of State, which may be before there is a general publication of the rule on a state-wide basis (see Revised Model Act Sections 4(2) and 5(b)). Accordingly, there may be a period of time where the only place that a new or amended rule can be seen is at the Secretary of State's

office or at the place where the agency makes its rules available for public inspection. Under the MAPA, rules do not become effective until ten days after they are published in the Montana Administrative Register, which is distributed throughout the state (see MAPA Sections 203(b) and 204(d)). Under the circumstances, it is felt that a less stringent sanction for failure to make rules available for public inspection is warranted in the MAPA.

Section 2(4) of the Revised Model Act requires that all final orders, decisions and opinions of agencies be made available for public inspection. This relates to an agency's contested case functions and a comparable provision is included in Section 305(b) of the MAPA (Appendix I, p. 16). Accordingly, the provision is omitted under Section 201.

Although the Revised Model Act provides for public inspection of rules, it does not require that an agency provide copies upon request. Section 201(a)(f) of the MAPA contains such a requirement and permits the agency to charge the cost of providing copies.

Section 201(c) of the MAPA provides that the Attorney General shall prepare a model form for rules describing the organization of agencies and for agency procedural rules for the guidance of all agencies in fulfilling the requirements of Section 201. Such model rules are to be drafted in a form which will make them appropriate for as many agencies as is practicable. There is no comparable provision in the Revised Model Act. It is included in the MAPA for two basic reasons: to establish, to the extent possible, uniform procedures among all state agencies, and to provide agencies, which are not manned by persons experienced in administrative procedures and do not have the resources to hire full-time

counsel, with proper guidance. Many smaller state agencies, including licensing boards, are operated by personnel working on a part-time basis. Often personnel, even though full-time, are inexperienced in administrative procedures and need technical guidance which may be beyond the financial means of the agency. It is felt that Section 201(c) will provide this guidance and will result in the desirable uniformity in administrative procedures. The Section is patterned after Section 201(a) of Senate Bill No. 179 (Appendix III, p. 3) and Section 183.340 of Oregon's Administrative Procedure Act.

2. Procedures for Adoption of Rules

The Revised Model Act

Section 3 of the Revised Model Act (Appendix II, p. 2) sets forth procedures to be followed by agencies in adopting rules. Prior to the adoption, amendment or repeal of any rule an agency must give at least 20 days notice of its intended action. The notice must include:

- a) The terms or substance of the intended action or a description of the subjects or issues involved; and
- b) A statement of the time when, the place where and the manner in which interested persons may present their views.

The notice must be mailed to persons who have made a timely request for advance notice of rule-making proceedings and must be published.

An agency must give "all interested persons a reasonable opportunity to submit data, views or argument orally or in writing." In the case of substantive rules, an oral hearing must be granted upon the request of 25 persons, an association having not less than 25 persons, or a governmental subdivision or agency.

The agency is required to consider all submissions and, where a timely request is made, must issue a statement explaining the reasons for its ultimate actions.

If an agency finds an imminent peril to public health, safety, or welfare, it may adopt emergency rules without prior notice or hearing, or upon abbreviated notice and hearing. It must state in writing the reasons necessitating the emergency action and any emergency rule may be effective for a period not to exceed 120 days (a renewal period can be provided for).

Rules are not valid unless adopted in substantial compliance with the

above requirements. However, there is a two year limitation period for commencing actions to challenge rules for non-compliance with adoption procedures.

Purpose for the Requirement

The essential purpose of section 3 of the Revised Model Act is to establish practical uniform procedures for agencies to follow in the exercise of their rule-making functions, and to permit interested members of the public to meaningfully participate in the rule-making process. Since rule-making is an important agency function and has a substantial impact on the public, it is appropriate to have established procedures and to permit public participation.

The justification and purposes for permitting public participation in the rule-making process were summarized as follows in a report on rule-making prepared by the Wisconsin Legislative Council:¹³

"There are 3 primary reasons why interested persons, as a general proposition, should be afforded opportunity to participate in administrative rule making. The first is the general and theoretical one that, in a democracy, the governed should have opportunity to participate in their government, either personally or through their chosen representatives. Secondly, informed administrative action requires that all relevant facts be brought to light. Thirdly, it is important that those who be affected by a proposed rule are satisfied that their interests have received fair consideration, for good public relations is important in the successful enforcement of a rule."

The second reason was stated as follows in a report to the Tennessee Law Revision Commission:¹⁴

"The principal justification for public participation in rule making is that such participation serves as a means for an agency to obtain information about the content of the area to be regulated and about possible deficiencies or objections to particular rules provisions of which it is unaware."

Hearings may be held in the rule-making process at an agency's discretion, and must be held in the case of substantive rules where a substantial number of interested persons so request. The advantage of hearings where data, argument, views and information are submitted orally include:¹⁵

- (1) it is more likely that agency heads will hear and consider material presented, it being easier to listen to oral presentations than to read and consider written submissions;
- (2) oral exchanges and discussion between participants, especially where they take contrary positions, will assist in the examination and testing of opposing points of view; and
- (3) from the standpoint of time and preparation, oral presentations are more easily made than written presentations.

Procedures in State Agencies

Relatively few statutes for state agencies provide for rule-making procedures. In some instances procedures are specified, including a hearing requirement. Examples are the following:

- (1) Under normal circumstances rules may not be adopted by the Oil and Gas Conservation Commission without a public hearing upon ten days published notice. Interested parties are entitled to be heard. Emergency rules may be adopted without notice or hearing, but may not remain in effect for more than 15 days. R.C.M. 1947, Sect. 60-132.
- (2) The State Board of Health, acting under the Clean Air Act, can not adopt, amend or repeal rules, except after public hearing on

due notice and after an advisory council has been afforded 30 days prior to publication of the proposed text to comment thereon. Such notice must be given by public advertisement not less than 20 days nor more than 30 days prior to the date of such hearing. However, the foregoing requirement does not require a hearing before emergency orders are issued under circumstances where air pollution exists and creates an emergency requiring immediate action to protect human health and safety. R.C.M. 1947, Sect. 69-3917.

- (3) General and special rules may be adopted, amended, or rescinded by the Unemployment Security Commission only after public hearing or opportunity to be heard thereon, for which proper notice has been given. General rules are effective ten days after filing with the Secretary of State and publication in one or more newspapers of general circulation in this state. Special rules are effective ten days after notification to or mailing to the last known address of the individuals or concerns affected thereby. Regulations may be adopted, amended, or rescinded by the Commission in a manner and at a time prescribed by the Commission. R.C.M. 1947, Sect. 87-121.
- (4) Before promulgating regulations under the Montana Food, Drug and Cosmetic Act the State Board of Health must give "appropriate notice" for the proposal and for the time and place of a hearing. The regulations so promulgated become effective on a date fixed by the Board, which date can not be prior to ten days after its promulgation. Regulations may be amended or repealed

in the same manner as is provided for adoption, except that the Board, to such an extent as it deems necessary in order to prevent undue hardship, may disregard the foregoing provisions regarding notice, hearing or effective date. No hearing is required for the promulgation by reference of regulations promulgated under the Federal Act. R.C.M. 1947, Sect. 27-721.

The State Aeronautics Commission is authorized, but not required, to hold rule-making hearings. R.C.M. 1947, Sect. 1-204(k). Some state agencies have statutory requirements for a portion of their rule-making functions. For example, the State Board of Public Accountancy must, at least 60 days prior to the promulgation of rules of professional conduct or amendments thereto, mail copies of the proposed rules or amendments to each holder of a license along with a notice advising him of the proposed effective date thereof and requesting him to submit comments at least 15 days prior to the effective date. Such comments are advisory only. R.C.M. 1947, Sect. 66-1817. No procedures are specified for the adoption of procedural rules or for rules relating to other matters. There is no statutory procedure for rule-making by the Milk Control Board. However, Rule 2 of the Board's Rules of Pleading and Practice provide that "marketing rules" must be based upon public hearing at which licensees under the act and all interested will be allowed to attend and participate.

The usual situation is for agency statutes (and rules as well) to be silent regarding rule-making procedures. In response to an inquiry on the questionnaire, most agencies stated that they have no rule making procedures. This response was received from larger agencies such as the Industrial Accident Board, the Department of Public Welfare and Milk Control Board, as well as smaller agencies which have less business. The bulk of rule

making is done informally without specific procedures or public notice. Typically, rules are adopted in the same fashion as routine business which comes before the agencies. In most instances, public participation is neither sought nor involved. Some agencies seek the advice of the Attorney General with regard to the validity of their rules under the statutes which created them. Nothing in the Revised Model Act or the MAPA would prohibit the procedure. However, it must be recognized that such review of rules does not perform the same function as the public participation, which is to assist agencies in reaching legislative-type decisions.

MAPA Recommendations

Rule-making procedures are contained in Section 202 of the MAPA (Appendix I, pp. 5-7). This Section is patterned after Section 3 of the Revised Model Act. Specific modifications and additions are described below.

Section 202(a)(1) relates to notice of intended rule-making. Fundamentally, it is the same as Section 3(a)(1) of the Revised Model Act. Alterations have been made in the structure and wording of the subsection because the language of the Revised Model Act is appropriate for newspaper or like publication for rule-making proceedings. Section 202(a)(1) of the MAPA provides for publication in the Montana Administrative Register (the Montana Administrative Register is discussed in detail in the following section of this report relating to the filing and publication of rules). The Montana Administrative Register would be circulated widely throughout the state and may be subscribed to by interested persons (see Section 204(d) of the MAPA). It is felt that this is the most expedient, reliable and economical method of providing general notice for rule-making proceedings.

substantive rules if ten per cent or 25 directly affected persons make a proper request. This gives the requirement greater flexibility and insures that there will not be a disparity in treatment between small and large regulated groups. The words "directly affected" have been added to insure that agencies need not go to the trouble and expense of a hearing unless the persons requesting it have a substantial interest in the proceedings. These modifications are patterned after recommendations made by the Kentucky Legislative Research Commission.¹⁷

Some agencies already have hearing requirements for rule-making. To retain such requirements the following language has been added to Section 202(a)(2): "Where a hearing is otherwise required by statute, nothing herein shall be deemed to alter that requirement."

One final addition has been made in Section 202(a)(2). Language has been added which states: "Contested case procedures need not be followed in hearings held pursuant to this section." Rule-making proceedings are legislative in nature and this phrase does nothing more than restate general principles. However, it is deemed advisable to insert this sentence to properly instruct individuals who must comply with the MAPA, and individuals who may wish to take advantage of the procedures which it affords.

Section 202(b) of the MAPA relates to emergency rules. It is the same as Section 3(b) of the Revised Model Act, but the following sentence has been added: "The sufficiency of the reasons for a finding of imminent peril to the public health, safety, or welfare shall be subject to judicial review." This language was taken from the Oklahoma Administrative Procedure Act. 75 Okla. Stats. Sect. 303(b). Its purpose is to caution agencies to carefully exercise their authority to adopt emergency

substantive rules if ten per cent or 25 directly affected persons make a proper request. This gives the requirement greater flexibility and insures that there will not be a disparity in treatment between small and large regulated groups. The words "directly affected" have been added to insure that agencies need not go to the trouble and expense of a hearing unless the persons requesting it have a substantial interest in the proceedings. These modifications are patterned after recommendations made by the Kentucky Legislative Research Commission.¹⁷

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rules, because advanced notice and opportunity for public participation is not required. No provision is made in Section 202(b) for the renewal of emergency rules, because it is felt that the 120 day effective period is ample for the completion of conventional rule making procedures.

The sanction for failure to comply with rule-making procedures is found in Section 202(c) of the MAPA and Section 3(c) of the Revised Model Act. The Revised Model Act specifies a two year limitation period for commencing actions to contest a rule on the basis of non-compliance with procedural requirements. No mention is made of raising such non-compliance as a defense to the enforcement of a rule. 1 Davis, Administrative Law Treatise Sect. 1.04, Pocket Part p.23. Language has been added to the MAPA to extend the two year limitation period to situations where failure to comply with procedural requirements is raised as a matter of defense.

The Revised Model Act makes no mention of informal conferences and consultations and advisory committees as a means of gathering information for rule-making. These are useful techniques which are commonly used by state agencies. For example, the State Department of Health, under the Clean Air Act, and the Employment Security Commission have advisory committees which assist them in the rule-making function. Section 202(d) of the MAPA has been included to make it clear that these useful techniques may be employed during rule-making procedures, in addition to the formal requirements. This Section is patterned after the Wisconsin Administrative Procedure Act. Wisc. Stats. Sec. 227.018. A comparable provision was contained in Section 201(d) of Senate Bill No. 179.

Many agencies, in performing their rule-making function, have adopted rules which merely restate statutory language. Some agencies, when requested

to submit rules, submitted copies of statutes. In order that agencies more clearly understand the nature of their rule-making function, Section 202(e) is included in the MAPA. This Section provides that rules shall not unnecessarily repeat statutory language and requires a citation of authority for all rules that are adopted. There is no comparable provision in the Revised Model Act. Section 202(e) is also patterned after the Wisconsin Administrative Procedure Act. Wisc. Stats. Sect. 227.024. A comparable requirement is found in Section 201(e) of Senate Bill No. 179.

The study revealed that a number of agencies have gone for long periods of time without reviewing rules and making needed modifications. In order to meet this problem Section 202(f) has been included in the MAPA. That Section provides that: "Each agency shall at least annually review its rules to determine if any new rules should be adopted or any existing rules should be modified or repealed."



3. Filing, Effective Date and Publication of Rules

The Revised Model Act

Sections 4 and 5 of the Revised Model Act (Appendix II, pp. 3-4) deals with filing, effective date and publication of rules. Each agency is required to file with the Secretary of State (another officer or agency could be specified) certified copies of all rules, including all rules existing on the effective date of the act. The Secretary of State must keep a permanent register of rules which is open for public inspection.

Normally, rules are effective 20 days after filing with the Secretary of State unless a later date is required by statute or specified in the rule. Emergency rules may be effective upon filing or at a date less than 20 days thereafter. The agency's emergency findings must be filed with an emergency rule and the agency must take "appropriate measures" to make emergency rules known to affected persons.

The Secretary of State is required to compile, index and publish all effective rules adopted by state agencies. The compilation is to be supplemented or revised as often as is necessary (revision at least once every two years is recommended). The compilation is to be supplemented by a bulletin published monthly containing all rules filed during the preceding month.

The Secretary of State may omit from the bulletin or compilation any rule the publication of which would be unduly cumbersome, expensive or otherwise inexpedient if the rule is available upon application to the adopting agency and if the bulletin or compilation contains a notice stating the general subject of the omitted rule and how a copy may be obtained.

Bulletins and the compilations are to be made available to specified agencies or officials of the state free of charge and to other persons at a price fixed by the Secretary of State to cover mailing and publication costs.

Purpose for the Requirement

The purpose for the foregoing requirements is basic, to provide an adequate means of notifying the public of rules adopted by state agencies and to give the public reasonable access to those rules. The following statement was made by the Commissioners to explain the purpose for the publication requirement:

"Basic principles of fairness require that before individuals are required to comply with administrative rules, a reasonable attempt should be made to give notice and opportunity to become familiar with their contents."

Procedures in State Agencies

There is no provision for central filing or statewide distribution of rules for all state agencies. As indicated previously, the rules for some state agencies are not even available for inspection or distribution at their offices because they are buried in minutes of meetings or out of print. Many state agencies are not located in the state capitol. These agencies include (the location of each agency is noted in parentheses):

Board of Architectural Examiners (Bozeman), Board of Barber Examiners (Billings), Board of Chiropractic Examiners (Miles City), Board of Dental Examiners (Lewis-town), State Entomologist (Bozeman), Grass Conservation Commission (Miles City), Board of Hearing Aid Dispensers (Billings), Horse Race Commission (Shelby), Board of Morticians (Choteau), Board of Examiners in Optometry (Great Falls), Board of Osteopathic Examiners (Great Falls), Board of



Pardons (Deer Lodge), and Board of Pharmacy (Billings).¹⁸

The location of the offices of some state agencies change periodically with a change in agency personnel. In the past two years the location of the offices for the following agencies have changed (the change in location is indicated in parentheses): Board of Barber Examiners (Butte to Billings), Board of Chiropractic Examiners (Havre to Miles City), Examining Board of Cosmetology (Butte to Helena), Board of Dental Examiners (Missoula to Lewistown), Horse Race Commission (Missoula to Shelby), Board of Massage Examiners (Missoula to Helena), and Board of Examiners in Optometry (Baker to Great Falls).¹⁹

The combination of circumstances described above means that there is no place in the state where a person can go to view all agency rules and that the rules for agencies are not accessible throughout the state. The problems are compounded by the fact that most rule-making is done without public notice or participation.

MAPA Recommendations

The foregoing summary demonstrates the need for the basic filing, effective date and publication requirements set forth in Sections 4 and 5 of the Revised Model Act. Comparable provisions are found in Sections 203 and 204 of the MAPA. They follow the pattern and concept of the Revised Model Act. However, modifications and additions have been made and, in several significant respects, the MAPA has more detailed and specific requirements.

Section 203 of the MAPA (Appendix I, p. 7) states the filing and effective date requirements for all rules. It contains specific filing requirements for rules in effect on the effective date of the MAPA and rules adopted thereafter.

Section 4(a) of the Revised Model Act requires the filing of rules

in existence on the effective date of the act, but does not give a deadline. Section 203(a) specifies a 60 day deadline. It is felt that the deadline is important because of the public interest in having central filing at an early date, to give specific instruction to agencies with regard to the filing requirement and so the Secretary of State will not be unduly delayed in compiling, indexing and publishing the Montana Administrative Code pursuant to Section 204(a) of the MAPA.

Except in the case of emergency rules and rules where a later date is specified in the rule or required by statute, new rules are effective ten days after publication in the Montana Administrative Register (see Section 204(b)). Under Section 4(b) of the Revised Model Act, with the same two exceptions noted above, new rules are effective 20 days after filing with the Secretary of State. Under the scheme of the Revised Model Act, a rule could be effective before it is published on a statewide basis in the Register (referred to as a bulletin in Section 5(b) of the Revised Model Act), since the Register is published monthly. Basic principles of fairness dictate that individuals should not be required to comply with a rule until a reasonable attempt has been made to give notice of its existence. It is felt that making rules effective ten days after publication in the Register, which provides statewide publication, is more consistent with these principles than the comparable provision of the Revised Model Act.

The study of state administrative procedures revealed that there is a substantial lack of uniformity in the form in which agencies adopt and publish rules. Section 203(c) of the MAPA gives the Secretary of State authority to prescribe a standard format, style, and arrangement for rules



which are filed. This will be of great assistance to the Secretary of State, especially in compiling and indexing the Code and Register. Any inconvenience to particular agencies will be relatively slight in comparison to the inconvenience to the Secretary of State caused by a lack of uniformity. The Revised Model Act has no comparable provision. This Section is patterned after Section 203 of Senate Bill No. 179.

Section 204 of the MAPA (Appendix I, p. 8) provides for publication and statewide distribution of all agency rules. The Secretary of State is required to publish a compilation of rules in a publication called the Montana Administrative Code. The Code is to be published in loose-leaf form and will be distributed widely throughout the state (see Section 204(e) of the MAPA). Each county will have at least one current set of the Code available for public inspection. To insure that current copies of the Code are available throughout the state, Section 204(e) specifies that the Secretary of State, the Clerks of the Courts of record, the County Clerks and the Librarians for the State Law Library and the University of Montana Law Library maintain complete current sets of the Code. The Code will be supplemented monthly by the Montana Administrative Register which will contain rules adopted subsequent to the publication of the Code.

The loose-leaf form of publication is specified because it is believed that it will be the most convenient and expedient means of keeping the Code current. As rules are amended, replacement pages will be published as part of the Register and can be slipped into the Code in place of superseded pages. New rules can be slipped in at appropriate places. The Code will always be current without the need for resorting to awkward

pocket parts which would otherwise have to be published periodically. The loose-leaf format for the Code and Register combines the features of monthly notice of rules changes with continual revision. A number of states, including Wisconsin and California, use the loose-leaf format for their administrative codes. The Wisconsin Legislative Council investigated alternative means of publication extensively and concluded that this format best filled the primary requisites of a good publication system, reliability, convenience to the user and flexibility.²⁰ Section 204 is, to some extent, patterned after Section 35.93 of the Wisconsin statutes.

Section 204(d) of the MAPA requires that the Code be arranged in such a fashion that there may be separate printings of the rules for individual agencies. This coordination between the Secretary of State and individual agencies should result in cost savings to state agencies. Under Section 201(a)(4) of the MAPA agencies are required, upon request, to provide copies of their rules.

The Montana Administrative Register is to be published in two sections, the Rules Section and the Notice Section. The function of the Rules Section has already been discussed. The Notice Section is the official vehicle for publication of rule-making notice, although other methods of publication must also be used where required by statute (see Section 203(a)(1) of the MAPA). The Secretary of State, Clerks of the Courts of record, County Clerks and Law Librarians are required to keep a file of such notices for the preceding two years. The two year period is selected to correspond with the two year limitation period set forth in Section 203(c) of the MAPA for challenging rules on the basis of irregularities and adoption procedures.

Section 204(f) of the MAPA requires that the Secretary of State make subscriptions to the Code and Register available to any person at a price which is to cover publication and mailing costs.

Section 204(g) gives the Secretary of State needed flexibility in establishing the cost for printing and mailing.

4. Petition for Adoption of Rules

The Revised Model Act

Section 6 of the Revised Model Act (Appendix II, p. 4) gives interested persons (persons affected by agency rules) the right to petition an agency requesting the promulgation, amendment or repeal of a rule. Agencies must prescribe a procedure for the submission and disposition of such petitions and the agency must, within 30 days, initiate rule-making proceedings or deny the petition in writing stating reasons.

Purpose for the Requirement

This Section provides an avenue by which rule-making can be initiated from outside of state agencies. Its provisions are consistent with the concept that there should be an opportunity for the public to participate in the rule-making process.

Procedures in State Agencies

Typically, state agencies are not required by statute to establish procedures for initiation of rule-making proceedings from interested parties outside the agency. A comparable requirement is contained in R.C.M. 1947, Section 60-132F with regard to rule-making by the Oil and Gas Conservation Commission.

MAPA Recommendations

Section 205 of the MAPA (Appendix I, p. 11) is the same as Section 6 of the Revised Model Act, with one exception. The Revised Model Act requires that an agency act on a petition within 30 days. Section 205 specifies a 60 day period.

Experience with a comparable provision in the Model Act, which set

no time limit, showed that agencies reacted slowly or not at all to petitions. Accordingly, a time limit is desirable. However, 60 days is more realistic for Montana in view of the fact that key personnel in many agencies are scattered around the state, making action within a 30 day period impractical.

5. Judicial Notice of Rules

The Revised Model Act

There is no provision in the Revised Model Act with regard to judicial notice of agency rules.

Purpose for the Requirement

If courts take judicial notice of agency rules, it is unnecessary to submit evidence as to their existence and authenticity when they are involved in a judicial proceeding. Courts can take notice of the existence of rules in the same manner as they do statutes.

Procedures in State Agencies

In the past, the State Supreme Court has refused to take judicial notice of agency rules. Sullivan, A Case for an Administrative Procedure Act 21 Mont. L.R. 168, 173; Williams v. Anaconda Copper Mining Co., 96 Mont. 204, 211, 29 P.2d 649 (1934); State ex rel Magelo v. Industrial Accident Board, 102 Mont. 455, 461, 59 P.2d 785 (1936); State v. Andre, 101 Mont. 366, 368, 54 P.2d 566 (1936). More recently, the court has held that it "may take judicial notice" of rules and regulations of the Commissioners of Agriculture. Northern Montana Mustard Growers Co-operative v. Britton, 128 Mont. 553, 567, 280 P.2d 1078, 1085 (1955).

MAPA Recommendations

Section 206 of the MAPA (Appendix I, p. 12) requires that courts take judicial notice of any agency rule filed and published under the provisions of the act. The procedures required by the MAPA justify this requirement and should overcome any judicial reluctance in this area.

C. CONTESTED CASES

1. Notice and Hearing Requirements

The Revised Model Act

Section 9 of the Revised Model Act (Appendix II, p. 5) provides, in part, for notice and hearing requirements in contested cases (where agencies perform a quasi-judicial function). Sub-section (a) provides that all parties shall be afforded an opportunity for hearing after reasonable notice. Sub-section (b) states that the notice shall include:

- a) A statement of the time, place and nature of the hearing;
- b) A statement of the legal authority and jurisdiction under which the hearing is held;
- c) A reference to the particular sections of the statutes for rules involved; and
- d) A short and plain statement of the matters asserted.

If the agency is unable to state the matters asserted in detail at the time the notice is served, it must at least state the issues involved. Thereafter, a party is entitled to a more definite and detailed statement upon application.

Sub-section (c) provides that all parties shall be afforded an opportunity to respond and present evidence and argument on all issues involved in the hearing.

Purpose for the Requirement

A "contested case" is by definition a proceeding in which legal rights duties and privileges are "required by law" to be determined after an opportunity for hearing. The words "required by law" have broad meaning and include legal requirements which are based upon constitutional rights.

1 Cooper, State Administrative Law, 120; Merrill, Oklahoma's New Administrative

Procedure Act, 17 Okla. L.R. 1, 39-40. The requirement for hearing may be set forth in the statute or, where the statutes are silent, may be required as a matter of constitutional right. Where a hearing is required, fundamental "due process" considerations dictate that a party have adequate notice and an opportunity to meaningfully participate.

The right to notice and hearing in connection with administrative action which is quasi-judicial in nature has been recognized by the United States Supreme Court and state courts as well. It has been recognized on numerous occasions by the Montana Supreme Court. In 1911 in State v. Shultz,²¹ the court held that the Board of Medical Examiners could not revoke a physician's license without a hearing preceded by proper notice. The court said:

"We are satisfied that the legislative assembly did not intend to clothe the Medical Board of the State with the arbitrary power to revoke the certificate of a physician, without a reasonable notice of the charge against him, and the time and place of the trial thereof. The statute, by its mere silence prescribing the procedure, can not be so construed."

At that time, the statutes relating to the Board of Medical Examiners did not provide for a hearing in license revocation proceedings.

In State ex rel. Opheim v. Fish and Game Commission,²² an employee of the Fish and Game Commission was discharged after appearing as a witness at a hearing. He had no prior notice that the Commission contemplated disciplinary action against him. The Montana Supreme Court said:

"Summarizing then, it is our view that the relator (the discharged employee) was entitled to have notice of the specific charges relied upon, and a hearing thereon at a time and place fixed therefor, of which he should have reasonable notice so that he may prepare to meet the charges; also, all of this should be done before and not after summary dismissal. Clearly from the application herein relator was not granted such consideration by the commission."

The court has stated that the State Board of Equalization "acts in a quasi-judicial capacity" and that in assessment hearings the Board must proceed "in a lawful manner of providing hearings with attendant rights of due process." International Business Machines Corp. v. Lewis & Clark County, 111 Mont. 384, 388, 112 P.2d 477 (1940). State ex rel. Board of Equalization v. Kovich, 142 Mont. 201, 209, 383 P.2d 818 (1963).

The Arizona Supreme Court, in a case involving the summary denial of a license, summarized the due process requirements as follows:²³

"It is too well settled, to permit any argument to the contrary, that procedural due process requires petitioner be given an opportunity to be heard upon the matters which the Board of Welfare acted in denying a license. See Goldsmith v. United States Board of Tax Appeals. 270 U.S. 117, 46 S.Ct. 215, 70 L.Ed. 494. Petitioner must be given notice of time and place of hearing, a reasonable definite statement of the grounds for denial of her application, the right to produce witnesses in her own behalf, the right to examine witnesses who testify against her and a full consideration and a fair determination according to the evidence by the body before whom the hearing is had."

The purpose of Sections 9(a) through (c) is to insure that state agencies comply with the foregoing constitutional requirements, and to provide specific guidelines for them in fulfilling the requirements. Section 9(a) requires "reasonable notice." This is a flexible requirement which may vary from agency to agency. It is a term having constitutional significance and is used to insure that in a particular case a party will have an adequate opportunity to prepare for a hearing. 1 Cooper, State Administrative Law, 273-274.

The drafters of the Revised Model Act have included within the definition of "contested case" licensing, rate-making and price-fixing. As demonstrated by the cases discussed above, decision making in licensing is normally regarded as a contested case function. Procedures followed for rate-making and price-fixing in Montana are discussed below.

Procedures in State Agencies

Numerous state agencies have contested case functions. In many instances, relevant statutes provide for a hearing after notice, the content of which is in substantial accord with the requirements of Section 9(b) of the Revised Model Act. For example, when the State Board of Public Accountancy wishes to revoke or suspend a license it must meet the following notice requirement:

"A written notice stating the nature of the charge or charges against the accused and the time and place of the hearing before the Board on such charges shall be served on the accused not less than thirty (30) days prior to the date of said hearing, either personally or by mail, a copy thereof (by) registered mail to the address of the accused last known to the Board." (R.C.M. 1947, Sect. 66-1836(a))

The Water Well Contractors' Examining Board may revoke or suspend a license only upon "at least ten days written notice prior to the time set for hearing, notifying him (the licensee) of the time and place of hearing and furnishing him with a true and correct copy of the complaint." R.C.M. 1947, Sect. 66-2611.

The Montana Horse Race Commission has authority to conduct hearings for the cancellation or revocation of unexpired race meet licenses. R.C.M. 1947, Sect. 62-507 requires three days written notice "specifying the grounds for the proposed cancellation."

Other agencies having statutes which require notice as to time and place of hearing, and some statement of the purpose for the proceeding or the nature of the charges involved, include: the State Board of Nursing (R.C.M. 1947, Sects. 66-1225, 1240 and 1241); the State Board of Veterinary Medical Examiners (R.C.M. 1947, Sect. 66-2210); the State Board of Professional Engineers and Land Surveyors (R.C.M. 1947, Sect. 66-2345);

the State Board of Pharmacy (R.C.M. 1947, Sect. 66-1504(b)(7)); the Oil and Gas Conservation Commission (R.C.M. 1947, Sect. 60-132); and the Montana Real Estate Commission (R.C.M. 1947, Sect. 66-1938.1).

However, the statutes for some agencies make no mention of notice or hearing with regard to the contested case function. For example, the State Board of Osteopathic Examiners (R.C.M. 1947, Sect. 66-1401 et seq.) and the State Electrical Board (R.C.M. 1947, Sect. 66-2801 et seq.) both have authority to deny and revoke licenses. There is no mention in the statutes relating to these agencies of a hearing with regard to these functions.

The statutes for a number of other agencies mention a hearing, but provide no guidance with regard to the contents of the notice of hearing. For example, R.C.M. 1947, Section 66-2409 provides that the State Board of Medical Examiners may "after due notice and hearing" refuse to license a physical therapist applicant or refuse to renew the license of a physical therapist. No further instructions are given to the agency with regard to what shall constitute "due notice and hearing." Similarly, R.C.M. 1947, Section 66-2908 provides that the State Board of Massage Examiners "may, after due hearing, refuse to grant, revoke or renew a license" and R.C.M. 1947, Section 66-3109 provides that the State Board of Examiners for Nursing Home Administrators may "for cause, after due notice and hearing," revoke or suspend a license.

Frequently statutes require a hearing for some contested case functions, but not for others. For example, the State Board of Public Accountancy is required to give notice and hearing prior to the revocation or suspension of a license (R.C.M. 1947, Sect. 66-1834). However, there is no such

requirement where the Board refuses to issue a license. One requirement for the issuance of a license is that the applicant be of "good moral character." R.C.M. 1947, Sect. 66-1819. This situation is discussed in more detail below in the section of this report relating to licensing.

Under the Revised Model Act price-fixing and rate-making are expressly included within the definition of "contested case" and such proceedings must be conducted in accordance with contested case procedures. This should not represent a departure from procedures presently followed by state agencies.

The Railroad and Public Service Commission is required by statute to hold hearings regarding rate changes for public utilities (R.C.M. 1947, Sects. 70-119, 121) and rates and charges made by railroads for freight and passenger service (R.C.M. 1947, Sects 72-116, 118). Rule 17 of the Commission's "General Rules of Practice" states:

"Changes in Rates, Rules or Service
How Made, Hearings. Should any utility or carrier desire to change, alter, modify or extend any rate, toll, charge, rule, regulation or service which, by the provisions of the laws of the State may not be changed except upon authorization from the Board, application must be made to the Board setting forth explicitly the nature thereof. The Board will either grant or refuse such application. In case of refusal, however, the utility or carrier affected may file a petition for a hearing, and decision thereon will be rendered in the same manner as decisions in cases upon complaint." (Emphasis added)

The State Aeronautics Commission also has a rate fixing function. R.C.M. 1947, Section 1-323(2)(b) provides that the Commission may: "After notice to all interested parties and the public, and after hearing, fixed rates, fares, charges, classifications, and rules for each such."

The State Board of Cosmetology has authority to approve price agreements under which minimum prices for hair dressing and beauty culture are established. R.C.M. 1947, Sect. 66-806(1). It also has the authority:

"... on its own initiative, investigate or cause to be investigated conditions existing in the practice of cosmetology throughout the state, and shall establish new or modify existing minimum prices wherever and whenever it shall appear in the discretion of the board that such action shall be in the best interests of public health and safety and in keeping with the purposes and objectives of this act." R.C.M. 1947, Sect. 66-806(3)

Section 66-806(3) further provides:

"In no event shall any minimum price agreement or standard be established, approved, modified or abolished, except after public hearing thereon, notice of said hearing and the purpose, time and place thereof to be mailed by the board to every licensed practitioner in the area affected thereby as the same shall appear from the records of the board and shall be published at least once in a newspaper of general circulation which the board shall deem most likely to give notice to the public, such mailing and publication to be done not less than ten (10) days prior to the hearing."

The State Board of Barber Examiners has a similar function with regard to fixing minimum prices for work performed in barbershops. R.C.M. 1947, Sect. 66-409. The statute does not specifically require a hearing, but states that the Board may act "after ascertaining by such investigations and proofs as the condition permits and requires." After such investigation, minimum prices are fixed "by official order." In the course of its investigation the Board must consider "all conditions affecting the barber business and its relation to the public health and safety" and "the necessary cost incurred in the city and town in maintaining a barbershop in a clean, healthful and sanitary condition."

Although no hearing is required by statute, one may well be required as a matter of constitutional right if requested by barbers who wish to oppose minimum prices which the Board proposes to fix.

Where statutes provide for a specific notice period there is a lack of uniformity with regard to the duration of the period. Since the function of the various agencies and the requirements of the areas which they regulate vary, this lack of uniformity is to be expected. It does not create

due process problems so long as the notice period allowed is reasonable. The Horse Racing Commission is authorized to conduct hearings for cancellation of the licenses for race meets which are in progress on three days notice. In order to protect the rights of the parties involved and the public, a relatively short notice period is warranted. On the other hand, where the necessity for making an early determination is less important or there are complicating factors which make preparation for a hearing difficult, a longer period may be appropriate. The United States Supreme Court has stated that "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as the private interests that have been affected by the governmental action." Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

Examples of agencies which have longer notice period requirements are the following: the State Board of Nursing must give 20 days notice in revocation proceedings (R.C.M. 1947, Sect. 66-1241); the Consumer Loan Commissioner must give 10 days notice of hearing in a proceeding to revoke a lending institution's license (R.C.M. 1947, Sect. 47-223); and the State Board of Public Accountancy must give 30 days notice prior to the date of hearing in a proceeding for the revocation or suspension of a license.

MAPA Recommendations

Sections 301(a) through (c) of the MAPA (Appendix I, p. 12) are the same as Sections 9(a) through (c) of the Revised Model Act. These provisions do no more than require that agencies observe the basic requirements of due process with regard to notice and hearing in contested cases.

Section 301(a), like Section 9(a) of the Revised Model Act, requires "reasonable notice", rather than specifying a specific minimum. What may be reasonable notice for one agency or function, may be too short

or unduly long for another. Accordingly agencies should have a measure of discretion in this area. However, ^{whatever} ~~whenever~~ a period is selected it must stand the constitutional test of reasonableness.

Section 301(b) insures that parties to contested case proceedings will be fully apprised of the time and place of the hearing, as well as the purpose for the hearing and the matters to be considered, including specific reference to rules or statutes involved. Section 301(b) is more specific with regard to the content of the notice than are state statutes. It is desirable that the notice be specific so that parties may have an adequate basis for preparing for a hearing.

2. Record of Hearings

The Revised Model Act

Section 9(e) of the Revised Model Act (Appendix II, p. 5-6) provides that the record of a contested case proceeding shall include:

- 1) all pleadings, motions, intermediate rulings;
- 2) evidence received or considered;
- 3) a statement of matters officially noticed;
- 4) questions and offers of proof, objections, and rulings thereon;
- 5) proposed findings and exceptions;
- 6) any decision, opinion, or report by the officer presiding at the hearing;
- 7) all staff memoranda or data submitted to the hearing officer or members of the agency in connection with their consideration of the case.

Sections 9(f) and (g) provide that oral proceedings, or any part thereof, shall be transcribed on request of any party and that the agency's findings of fact must be based exclusively upon the record

Purpose for the Requirement

The purpose for Section 9(e) is to outline for agencies the content of the record which they must keep in contested cases. The record is important because it alone is the basis for the agency's findings of fact and it is also the record for judicial review under Section 15 of the Revised Model Act (Appendix II, p. 8-9).

Due process requires that the decision makers' findings of fact be based exclusively upon the hearing record. Parties must be afforded an opportunity to respond to all evidence which may be considered and relied upon by the agency.

Procedures in State Agencies

The statutes for a few state agencies have detailed record requirements. However, the following are more typical requirements: Testimony taken before the Montana Trade Commission must be "reduced to writing and filed in the office of the Commission" (R.C.M. 1947, Sect. 51-113(2)); the State Board of Architectural Examiners is required to file "a transcript of the entire record of proceedings" with its findings and conclusions in the office of the Secretary of State (R.C.M. 1947, Sect. 66-112); the Montana Real Estate Commission and the Employment Security Commission are required to keep a complete record of all proceedings, including testimony, but the record need not be transcribed unless an appeal is taken (R.C.M. 1947, Sect. 66-1938.1 and R.C.M. 1947, Sect. 87-108); the State Board of Morticians is required to take a stenographic record of proceedings and to furnish a copy to the person charged or accused (R.C.M. 1947, Sect. 66-2715).

Many statutes do not mention a record or merely make reference to minutes or a record of proceedings. For example, the State Board of Nursing is required to "keep separate and complete minutes and records of respective administrative meetings." R.C.M. 1947, Sect. 66-1225. In proceedings for the revocation or suspension of a physician's license, the executive secretary of the State Board of Medical Examiners is required to "enter in the records the facts of such action and any subsequent action of the Board with respect thereto." R.C.M. 1947, Sect. 66-1038(3).

The absence of a record requirement and vague references to minutes or a record have caused agency personnel to misunderstand their obligations with regard to maintaining a record in contested case proceedings. The State Supreme Court, in Thompson v. Babcock,²⁴ criticized the Board of Land Commissioners for not maintaining an adequate record in proceedings relating

to competitive bidding for the leasing of agricultural lands. The court said:

"In the future, if the Board is to follow a procedure similar to what occurred here, it is suggested that a more detailed record be maintained for the benefit of all parties involved. R.C.M. 1947, Section 18-104, requires 'complete minutes.' "

The court has also criticized the State Board of Equalization for not keeping a stenographic record in assessment proceedings which have been characterized by the court as quasi-judicial. State ex rel. Board of Equalization v. Kovich, 142 Mont. 201, 383 P.2d 818 (1963).

MAPA Recommendations

Sections 301(e) through (g) of the MAPA (Appendix I, p. 13) are patterned after Sections 9(e) through (g) of the Revised Model Act. Some additions and modifications have been made.

Specific reference is made to a stenographic record in Sections 301(e)(2) and (f) so that agencies will be fully aware of this requirement with regard to oral proceedings. Language has been added to Section 301(f) which requires that the cost of transcribing the stenographic record shall be borne by the requesting party, unless otherwise provided by statute. Some statutes require that the agencies prepare a transcript of proceedings which could be available to parties without cost.

The requirement that "all staff memoranda or data submitted to a hearing examiner or members of the agency in connection with their consideration of the case" be included in the record has been criticized because the language is broad enough to include legal memoranda prepared for the decision makers. 1 Davis, Administrative Law, Section 1.04, Pocket Part p.25. Such matters are normally not available to the parties in judicial proceedings or in agency contested case proceedings. To avoid such a construction of the MAPA the words "as evidence" have been added to Section 301(e)(7).

3. Conduct of Hearings

The Revised Model Act

Section 10 of the Revised Model Act (Appendix II, p. 6) establishes rules for the admission and exclusion of evidence and official notice in contested case hearings. Section 10(1) relates to rules of evidence. It provides that irrelevant, immaterial, or unduly repetitious evidence shall be excluded and that the rules of evidence as applied in (non-jury) civil cases in state courts shall be followed. However, when necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible there under may be admitted if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Agencies must give effect to the rules of privilege recognized by law and objection to evidentiary offers made are to be noted in the record.

Section 10(2) permits documentary evidence to be received in the form of copies or excerpts, so long as the parties shall have an opportunity to compare them with the original.

Section 10(3) states the right of parties to conduct cross-examination for a full and true disclosure of facts.

Section 10(4) provides that agencies may take notice of judicially cognizable facts. They may also take notice of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties must be notified of the materials so noticed, and they must have an opportunity to contest them. Finally, an agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence.

Purpose for the Requirement

The purpose for Section 10 is to set a framework for the admission and exclusion of evidence and making a record in contested case hearings.

The requirement that the rules of evidence, as applied in "non-jury" civil cases, be followed represents a substantial change from the comparable provision in the Model Act. Under the Model Act, agencies are not required to follow rules of evidence. They may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. This standard is similar to the exception in Section 10(1) of the Revised Model Act, which permits relaxation of the rules of evidence where the facts to be ascertained are not reasonably susceptible of proof thereunder. The Commissioners explained the change as follows:

"Accordingly the standards of proof in administrative adjudication are equated in reasonable degree and so far as possible with those applicable in the courts, thus leading to uniform treatment of evidence in all types of adjudication within the state. The phrase 'non-jury' is bracketed because in some states it is difficult to differentiate between the rules followed in jury and non-jury cases.

It is difficult to provide any single standard of evidence which is suitable for all agencies, in all circumstances. A review of State legislation in this area reveals wide departures from the standards of the present Model Act. The departures are in all directions -- some, in the direction of permitting the agencies to receive any testimonial offer; others, in the direction of limiting them to common law rules of evidence. The proposed language represents a compromise that owes much to the suggestions of the Hoover Commission Task Force and to provisions in the California, Michigan, North Dakota, Virginia and Wisconsin statutes."

Procedures in State Agencies

The statutes for state agencies vary with regard to the admission of evidence. As previously noted, some statutes make no mention of a hearing for the contested case function. Other statutes merely make reference to notice and hearing, but say nothing further. These agencies are left without guidelines with regard to the admission of evidence and conduct of hearings.

Where there is a provision relating to the admission and exclusion of evidence, agencies fall into three basic categories; those which must follow the rules of evidence which courts follow; those which are not bound by the rules of evidence; and those the requirements for which are ambiguous.

The hearing statutes for the Oil and Gas Conservation Commission are silent with regard to the rules of evidence. However, Rule 13 of the Commission's Rules and Practice of Procedure provides: "In general, the rules of evidence applicable before a trial court and without a jury shall pertain." Rule 317 adopts the rules of practice and procedure contained in the Code of Civil Procedure insofar as they may be applicable and not inconsistent with the Commission's rules.

Section 66-1241 of the Code provides that evidence presented to the State Board of Nursing "shall be examined and weighed by application of the rules of evidence in civil actions." This language is ambiguous. However, it would appear that the intent is that the rules of evidence applied by courts in civil actions should apply to proceedings before the Board.

The statutes for a number of agencies, including the State Board of Public Accountancy (R.C.M. 1947, Sect. 66-1836(f)), the Employment Security Commission (R.C.M. 1947, Sect. 87-108(a)), the Industrial Accident Board (R.C.M. 1947, Sect. 92-812), and the Montana Real Estate Commission (R.C.M. 1947, Sect. 66-1938.1), expressly state that the agencies are not bound by the rules of evidence. Agencies which state by rule that the rules of evidence need not be followed in contested case proceedings include, the State Board of Equalization, the Department of Public Welfare and the Railroad and Public Service Commission.

Section VII 2(i) of the Rules and Regulations for the State Board of Architectural Examiners provides:

"The Board shall conduct its hearings in an informal or summary manner, shall reserve the right to reject or refuse the admission of any evidence which it deems irrelevant or immaterial."

Although it is not expressly so stated, it appears that the Board is saying that the rules of evidence are not binding.

There is a similar lack of uniformity among statutes with regard to the basic right to cross-examination. The statutes for some agencies specifically recognize the right, while others make no mention of it.

MAPA Recommendations

Section 302 of the MAPA (Appendix I, p. 13-14) is the counterpart of Section 10 of the Revised Model Act. Section 302(a) provides as follows with regard to the rules of evidence:

"Except as otherwise provided by statute, agencies shall not be bound by common law or statutory rules of evidence. They may admit and give probative affect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. They shall give affect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence. Hearsay evidence may be admitted for the purpose of supplementing or explaining any direct evidence, but shall not be sufficient in itself to support a finding unless it would be admissible over objection for such purposes in civil actions."

This language is patterned after the Model Act and Section 303 of Senate Bill No. 179 and is a marked departure from the Revised Model Act. The standards for the admission and exclusion of evidence in Section 10(a) of the Revised Model Act have been criticized by a number of commentators.²⁵ Professor Gifford, in his report on administrative law to the Tennessee Law Revision Commission, made the following observations with regard to the Revised Model Act:²⁶

"The Revised Model Act raises the danger that many ^{technicalities} ~~technicalities~~ and refinements in the judicial rules of evidence, which have no place in adjudication before a specialized tribunal, may be imported into administrative proceedings. The original Model Act's standard of acceptability, by reasonably prudent men is better, although a supplementary standard phrased in terms of the specialized activities of each of the agencies might be desirable.

* * *

The type of evidence which should be admitted and acted upon by agencies will probably vary with the agency and the type of proceeding involved. For that reason, some discretion should be given the agencies and reviewing courts to accommodate evidence standards to particular proceedings. As suggested above, an across-the-board imposition of the judicial rules of evidence on all agencies would be unwise."

In 1965 the Idaho legislature adopted an administrative procedure act which is practically verbatim the Revised Model Act.²⁷ Idaho adopted the recommendations contained in the Revised Model Act with regard to the rules of evidence. The following comments and criticisms of the Revised Model Act are contained in an article in the Idaho Law Review which discusses and evaluates the state's administrative procedure act:²⁸

"The new evidentiary standard adopted by the Idaho Act appears certain to provoke more controversy than any other section of the APA. This is so not only because it is a section which the agencies will constantly have to apply during the course of a hearing, but also because, as one critic put it, it will require a 'crystal ball' to determine how the new standard is to be applied.

* * *

The evidentiary standard of the Revised Act has, however, been nearly unanimously criticized by the few articles so far discussing it.

The criticism generally is to the effect that: (1) the rules of evidence applicable to the trial situations were developed largely for the protection of juries and not designed for the administrative hearing, in fact, are under heavy criticism themselves; (2) the standard set forth, at best, an uncertain criteria because the rules applicable in a non-jury situation are not known, if indeed they exist; (3) the standard prescribed is far too nebulous to be applied by a forum composed exclusively of laymen. The author must case his lot with the critics. The large majority of Idaho agencies are composed of persons without any legal training whatsoever; an attempt to convert these individuals into legally trained hearing officers or judges is bound to result in nothing more than an exercise in wishful thinking."

To a large extent, Montana administrative agencies are operated by persons who do not have legal training. For this reason, requiring that agency personnel comply with technical rules of evidence is not deemed to be practical or appropriate. Moreover, Section 10(1) of the Revised Model Act is susceptible to varying interpretations, even by lawyers, and is subject to an exception the dimensions of which are unclear.

It is the author's conclusion that the rules of evidence should not be binding in contested case proceedings, unless otherwise provided by statute. However, this does not mean that agencies do not have limitations or guidelines. Section 302(a) provides a standard for admission and exclusion of evidence and expressly limits the extent to which findings can be based upon hearsay evidence. An additional requirement which insures that agency's findings will be based upon reliable evidence is found in Section 308(g) of the MAPA (Appendix I, p. 20-21) relating to judicial review. A court may reverse agency findings which are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Thus, an agency's findings of fact must be based upon reliable evidence, irrespective of the evidence which has been admitted during the course of the hearing.

Sections 302(b) relating to documentary evidence and 302(d) relating to official notice are the same as Sections 10(2) and 10(4) of the Revised Model Act. In Section 302(c) language has been added to Section 10(3) to more clearly state that parties have a right to conduct cross-examination and to insure that an agency does not receive evidence in documentary form which is not subject to proper cross-examination.

Section 303 of the MAPA, which also relates to the conduct of hearings,

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Section 303 of the MAPA, which also relates to the conduct of hearings,

and impartial hearing or consideration in a contested case. It is felt that this is a matter which should be expressly covered by statute.

Section 303(c) is patterned after the Oklahoma Administrative Procedure Act.³⁰

4. Decision Making

The final phase of the contested case function at the agency level is the decision making process. This is an area where state statutes typically have few requirements and offer little direction and guidance to agencies. Areas where more specific requirements and guidance are necessary are the following: the decision maker's familiarity with the record; insulation of decision makers from ex parte communications; the form and content of decision; notice and service for decisions; and public inspection of decisions.

These matters are dealt with in the Sections of the Revised Model Act and MAPA which are discussed below.

(a) The Decision Makers Familiarity with the Record

The Revised Model Act

Section 11 of the Revised Model Act (Appendix II, p. 6-7) requires that if a majority of the agency officials who are to render a final decision in a contested case have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposed decision is served upon the parties. Each adversely affected party must be given an opportunity to file exceptions and present briefs and oral argument to the officials who are to render the final decision. The proposed decision must be prepared by a person who has conducted the hearing or read the record, and must contain a statement of reasons and issues of law or fact necessary to the decision. Parties may, by stipulation, waive this requirement.

The Commissioners have explained the purpose for this requirement

with the following statement:

'The purpose of this section is to make certain that those persons who are responsible for the decision shall have mastered the record, either by hearing the evidence, or reading the record or at least receiving briefs and hearing oral argument. It is intended to preclude 'signing on the dotted line.' "

MAPA Recommendations

Section 304 of the MAPA (Appendix I, p. 16) is identical to Section 11 of the Revised Model Act. No comparable requirement was found for any state agency.

(b) Form, Content and Notice of Final Decisions and Orders

The Revised Model Act

Section 12 of the Revised Model Act (Appendix II, p. 7) requires that a final decision or order adverse to a party in a contested case shall be in writing or stated in the record. Parties must be notified either personally or by mail of the decision and upon request are entitled of a copy thereof.

The final decision must include findings of fact and conclusions of law separately stated. If findings of fact merely restate statutory language they must be accompanied by a concise and explicit statement of underlying facts supporting the findings. Where agency rules permit, a party may submit proposed findings of fact.

The notice and service requirements of Section 12 do no more than describe due process requirements. The provisions relating to the form and content of decisions are intended to improve the process of reaching a decision, as well as the form and content thereof. In addition, decisions in the form required will provide a better basis for judicial review.

MAPA Recommendations

Section 305(a) of the MAPA (Appendix I, p. 16-17) is identical to Section 12 of the Revised Model Act. Section 305(b) has been added to include the requirements for public inspection of decisions and orders which are contained in Section 2 of the Revised Model Act. Although this section is patterned after the Revised Model Act, two modifications have been ^{made} ~~made~~.

The Revised Model Act has been criticized because its language is broad enough to apply to decisions made before the effective date of the act. The result of such an interpretation would place a costly and substantial, if not unreasonable, burden upon agencies with regard to past decisions. 1 Davis, Administrative Law, Section 1.04, Pocket Part p. 22. In response to this criticism, language has been included in Section 305(b) which makes the public inspection and indexing requirement only applicable to decisions issued subsequent to the effective date of the act.

Decisions which, by state statute or federal statute or regulation, must be kept confidential are also exempt from the public inspection requirement. This has been added in response to a general criticism of the Revised Model Act and a specific recommendation for a state act. 1 Davis, Administrative Law, Section 1.04, Pocket Part p. 23; Sullivan, The Case for an Administrative Procedure Act, 21 Mont. L.R. 168, 185.

(c) Ex Parte Consultations

The Revised Model Act

Section 13 of the Revised Model Act (Appendix II, p. 7) provides that, unless required for the disposition of ex parte matters authorized by law, agency personnel assigned to render a decision or make findings



of fact and conclusions of law in a contested case, shall not directly or indirectly communicate with any person in connection with a fact issue, nor with any party or his representative in connection with an issue of law. However, this does not prohibit agency members from communicating with each other or prohibit them from having persons assist them in the decision making process.

It has been stated that "it is a fundamental principle of all adjudication, judicial and administrative alike, that the mind of the decider should not be swayed by materials which are not communicated to both parties and which they are not given an opportunity to controvert." Mezza v. Cavicchia, 15 N.J. 498, 415, 105 A.2d 545 (1954).

The purposes of Section 13 are to insure that fact determinations are made on the basis of the hearing record and that parties, or their representatives, do not make argument to the decision makers to which an opponent can not respond. The Commissioners' comment gives the following explanation:

"This section is intended to preclude litigious facts reaching deciding minds without getting into the ^{general} record. Also precluded is ex parte discussion of the law with the party or his representative. No objection is interposed to discussion of the law with other persons, e.g., the attorney general, or an outside expert."

MAPA Recommendations

Section 306 of the MAPA is, with one exception, the same as Section 13 of the Revised Model Act. Many state agencies are authorized to, and as a practical matter must, conduct an investigation to determine if formal contested case proceedings will be instituted. For example, R.C.M. 1947, Section 66-3109(e) provides as follows with regard to prehearing procedures to be conducted by the Montana State Board of Examiners for Nursing Home Administrators:

"Upon receipt of a written and signed complaint, an investigation of the matter contained in the complaint shall be initiated. At its next meeting, the complaint shall be presented to the board together with the report of investigation and recommendations and on the basis thereof, the board shall determine whether to bring charges and provide for a hearing."

To avoid a construction of Section 306 which would make it applicable to such preliminary investigations and determinations, language has been added to make the prohibition effective only after issuance of a notice of hearing. It has been stated that this is the intended meaning of the Revised Model Act.³¹ However, it is deemed advisable to expressly so state.

5. Licensing

The Revised Model Act

Section 14 of the Revised Model Act (Appendix II, p. 7) relates to licensing. It provides that:

a) When the grant, denial, or renewal of a license is required to be preceded by notice and opportunity for hearing, contested case proceedings shall apply;

b) When a licensee has made a timely and sufficient application for renewal of a license, or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency and, where the application is denied or the new license limited, until the time period for seeking review of the agency action has expired;

c) No revocation, suspension, annulment, or withdrawal of a license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with lawful requirements for retention of the license. If an agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, it may summarily suspend a license pending proceedings for revocation or other action.

Purpose for the Requirement

The definition of license is contained in Section 1(3) of the Revised Model Act (Appendix II, p. 1). The term is broadly defined to include "any agency permit, certificate, approval, registration, charter, or similar form of permission required by law." The definition includes

such functions as professional and occupational licensing, determinations with regard to certificates of public convenience and necessity, and similar functions where an agency must give some form of permission.

The Revised Model Act contains a specific section regarding licensing because of widespread dissatisfaction with the performance of many state agencies in matters concerning the granting, suspension, and revocation of licenses - particularly occupational licenses. 1 Cooper, State Administrative Law, 132.

Cooper makes the following observation about the process of granting or denying a license:

"A distinction should be noted (although it is not often the subject of discussion in court opinions) between the granting and the denial of license applications. If the outcome of the case is the granting of the license, the applicant cares little whether he has been granted a hearing or not; it is the grant of the license that is important. It is only in cases where the agency proposes to deny the license that the question as to the applicant's right to a hearing becomes acute. In such cases, the situation is closely akin to that of proceedings to revoke a license; and, at least where decision is based on a finding of fact, it seems clear that the same considerations should apply as in cases involving the revocation of licenses."

Principles of fairness and due process require that when an agency bases the denial of a license upon discretionary factual determinations, the applicant should have the right to a hearing. The United States Supreme Court and state supreme courts have recognized the necessity for hearing such situations as a matter of constitutional right. Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 (1926); Bennett v. Arizona State Board of Public Welfare, 95 Ariz. 170, 388 P.2d 166, 167-168 (1964). In the Bennett case the court said:

"We observe, as did the United States Supreme Court, that the multiplication of administrative agencies and the expansion of their functions to include adjudications which have serious

impact on prior rights has been one of the dramatic legal developments of the past one-half century. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 70 S.Ct. 445, 94 L.Ed. 616. While a state may bestow upon an administrative officer or administrative agencies the duty to protect the public health, safety and welfare by examining into the fitness of an individual to engage in an occupation, it cannot exclude such person from any occupation in a manner or for reasons that contravene the due process clause of the 14th Amendment. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed. 2d 796.

It is too well settled, to permit any argument to the contrary, that procedural due process requires petitioner be given an opportunity to be heard upon the matters which the Board of Welfare acted in denying a license. See *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117, 46 S.Ct. 215, 70 L.Ed. 494.

In the Bennett case the licensing statute was held unconstitutional because it failed to require a hearing for denial of a license. The court reasoned that the right to hearing was deliberately, rather than inadvertently, omitted because a hearing was specifically provided for where a license was to be suspended or revoked.

Situations may arise where the summary withdrawal of a license is required to protect public health, safety and welfare. In such situations, an agency may suspend a license summarily, pending a full contested case hearing.

Procedures in State Agencies

The Montana Supreme Court has recognized that the granting or denial of certificates of public convenience and necessity is a licensing function. Baker Sales Barn, Inc. v. Montana Livestock Commission, 140 Mont. 1, 8, 367 P.2d 775 (1962). Statutes which delegate this authority to agencies require a hearing. For example see, R.C.M. 1947, Section 1-323 (State Aeronautics Commission); R.C.M. 1947, Section 8-111 and 111.1 (Railroad and Public Service Commission); and R.C.M. 1947, Section 46-908 (Montana

Livestock Commission).

The type of problems which Section 14 of the Revised Model Act is intended to correct exist in state licensing statutes. In most instances, licensing statutes provide for a hearing when a previously issued license is to be revoked or suspended. However, as noted above in the discussion of the hearing requirement in contested cases, the statutes for some agencies do not require a hearing in this situation. A more widespread problem exists with regard to the denial of a license upon initial application. The statutes for many agencies, while requiring a hearing for revocation or suspension, contain no such requirement where a license must be or may be denied on the basis of discretionary factual determinations. Examples of such statutes are the following.

The State Board of Morticians may refuse to grant, suspend or revoke a mortician's or funeral director's license for stated grounds which include, fraud with regard to the application for a license or in passing the required examination; violation of the act relating to morticians and funeral directors or any rule or regulation of the state, district or local Board of Health governing the disposition of dead human bodies; or violation of any rule of the Board relating to the profession of mortuary science or funeral direction. R.C.M. 1947, Sect. 66-2707. However, a hearing is required for only where a license is to be suspended, revoked or cancelled. R.C.M. 1947, Sect. 66-2715.

In order to take an examination to be licensed as an optometrist, the State Board of Examiners in Optometry must conclude that an applicant is "of good moral character." R.C.M. 1947, Sect. 66-1305. There is no statutory requirement for a hearing in the event that an applicant is declared

ineligible to take the examination for failure to meet this requirement.

The State Board of Registration for Professional Engineers and Land Surveyors may not issue a license to an applicant "who is not of good character and reputation." R.C.M. 1947, Sect. 66-2336(4). However, the hearing requirements for the Board relate only to the power to "revoke, reprimand, suspend, or refuse to renew" a license.

Individuals licensed by the State Board of Examiners for Nursing Home Administrators are required to be "of good character and of sound physical and mental health." R.C.M. 1947, Sect. 66-3103. No hearing is required by statute for the refusal to issue a license, although there is an express requirement for "due notice and hearing" if a license is to be revoked or suspended. R.C.M. 1947, Sect. 66-3109.

Other agencies which do not have a hearing requirement for the refusal to grant a license, where discretionary factual determinations are involved, include, the State Board of Public Accountancy, the Consumer Loan Commissioners, the State Board of Dental Examiners, the Horse Racing Commission, the Water Well Contractors Examining Board, and the Board for Certification of Water and Waste Water Operators.

MAPA Recommendations

Section 307 of the MAPA (Appendix I, p. 18) is substantially the same as Section 14 of the Revised Model Act. However, some additions have been made:

Section 307(a) of the MAPA provides that contested case procedures apply when "the grant, denial, renewal, revocation, suspension, annulment, withdrawal, limitation or amendment of a license is required by law to be preceded by notice and opportunity for hearing." The corresponding section of the Revised Model Act, Section 14(a), requires contested case procedures

when "the grant, denial or renewal of a license is required to be preceded by a notice and opportunity for hearing." The reference to revocation, suspension, annulment, withdrawal, limitation or amendment has been added because the statutes for some agencies are silent with regard to hearing in this type of situation. In State v. Schultz, supra, the Supreme Court recognized the right to a hearing where a license is being revoked or suspended.

The words "required by law" as used in Section 307(a) have the same broad meaning which was discussed above in the section relating to notice and hearing requirements in contested cases. The intent is to insure that contested case procedures will be followed in all licensing situations where a hearing is required by statute or as a matter of constitutional right, including the denial of a license on the basis of discretionary considerations.

A number of Montana statutes are similar to the one which was held unconstitutional in Bennett v. Arizona State Board of Public Welfare, supra. This provision should foreclose the type of constitutional attack on these statutes which was successful in that case.

Sections 307(^b~~a~~) and (^c~~b~~) of the MAPA are the same as Sections 14(b) and (c) of the Revised Model Act, except that the word "amendment" has been added in the first line of Section 307(c).

6. Judicial Review of Decisions and Orders

The Revised Model Act

Section 15 of the Revised Model Act (Appendix II, p. 8-9) relates to the right to, procedures for and scope of judicial review of agency decisions and orders in contested cases. The section is long and no attempt is made to summarize its contents here. The reader is referred to Appendix II to read the full text of the section.

Purpose for the Provision

The purpose for Section 15 is to provide one method for judicial review that may be used for final decisions of all agencies. A clear, well defined, uniform procedure for all agencies would be of great benefit to agencies, parties who appear before the agencies, and the courts that must handle the review proceedings.

However, Section 15(a) of the Revised Model Act preserves existing forms of review, including trial de novo. In this regard, the Commissioners have made the following comment:

"An important question that arises under subsection (a) is whether or not the review provisions should be made exclusive and all other review provisions on the statute books should be repealed. Each state will have to deal with this matter as the local circumstances dictate. On the one hand, if there is but one mode and scope of review, the state procedural structure is greatly simplified. On the other hand, local considerations, including practical considerations connected with obtaining adoption of the Model Act, may indicate or even require the retention, at least for the moment, of the pre-existing methods of judicial review."

This comment indicates that existing forms of review are preserved in the Revised Model Act as a matter of expediency, to eliminate opposition to passage, not because that approach is considered to be the most desirable.

Procedures in State Agencies

Judicial review of agency decisions is one of the most confused and troublesome areas in state administrative procedures, due to a lack of uniformity among state agencies as to mode and scope of review. The statutes for a number of agencies make no mention of judicial review whatsoever. These agencies include, the Department of Labor and Industry, the Board of Chiropractic Examiners, the State Board of Equalization, the State Board of Eugenics, the Montana Horse Racing Commission, the State Board of Massage Examiners, the State Board of Osteopathic Examiners, the State Board of Veterinary Medical Examiners, the Board for Certification of Water and Waste Water Operators, the Department of Public Welfare, the State Athletic Commission, the State Board of Chiropodic Medical Examiners and the State Board of Land Commissioners.

However, the absence of a provision for judicial review has not stopped the Supreme Court from reviewing agency decisions. Recently in Bailey v. Grande,³² involving a decision of the Board of Administration for the Public Employees' Retirement System, the Supreme Court stated:

"At the outset we are confronted with the fact that there is no statutory provision for review of the Board's decision by either the district court or this Court. Nonetheless, courts have inherent power to review the actions of administrative agencies, as here, by extraordinary writ. However, in so doing, the district court cannot substitute its judgment for that of the Board on the question of whether disability arose out of and in the course of relator's employment, (State ex rel. Sanders v. (Hill) P.E.R.S., 141 Mont. 558, 381 P.2d 475) although it may review the Board's findings to determine whether the Board has acted arbitrarily, capriciously, or whether it has abused its discretion in relation to relator's claim. (cf. 2 Am. Jur. 2d Administrative Law, Secs. 620, 650). In other words, the district court may determine whether due process of law has been afforded a claimant; it cannot usurp the duties and powers invested in the Board by law."

Although there is no provision for judicial review in the statutes relating to the State Board of Equalization or the State Board of Land

Commissioners, the Supreme Court has stated that it will review decisions of these agencies. In International Business Machines Corp. v. Lewis & Clark County³³ the court stated that decisions of the State Board of Equalization may be had by means of the writ of certiorari or injunction. In Thompson v. Babcock³⁴ the court indicated that the writ of certiorari would be appropriate for review of decisions of the Board of Land Commissioners.

The absence of statutory provisions providing for a specific means of judicial review has, however, caused confusion and uncertainty. In Bailey v. Grande the plaintiff asked the lower court for an "alternative writ of mandamus or other appropriate writ." The court entered a judgment for a peremptory writ of prohibition.³⁵

In Thompson v. Babcock the petitioner sought review by writ of mandamus. The Supreme Court held that the writ of mandamus was not proper for review to correct errors involving discretion and affirmed the lower court's dismissal. The court suggested a writ of certiorari as "a more appropriate legal tool" to obtain review. However, in Skaggs Drug Center v. Montana Liquor Control Board³⁶ the court made the following statement with regard to the writ of mandamus:

"But even where discretion is involved, if it has been such an abuse as to amount to no exercise of discretion at all, mandamus will lie to compel a proper exercise of the powers granted."

The effect of this uncertainty is that a party seeking judicial review of an agency decision may not know if he has commenced the proper action for review until he gets to the Supreme Court. If he has selected the wrong one, he may have to start all over again.

The statutes for a number of agencies mention the right to review or appeal, but say little or nothing about how it should be accomplished, or

to the extent to which a court may review the agency's findings. Agencies having this type of statute include the State Aeronautics Commission (R.C.M. 1947, Sect. 1-310(a)), the State Board of Cosmetology (R.C.M. 1947, Sects. 66-811, 814), the State Entomologist (R.C.M. 1947, Sect. 82-807), and the State Board of Morticians (R.C.M. 1947, Sect. 66-1040), the Board of Examiners in Optometry (R.C.M. 1947, Sect. 66-1312), the Board of Professional Engineers and Land Surveyors (R.C.M. 1947, Sect. 66-2345), the State Board of Pharmacy (R.C.M. 1947, Sect. 66-1509), the State Board of Examiners of Nursing Home Administrators (R.C.M. 1947, Sect. 66-3114), and the Consumer Loan Commissioners (R.C.M. 1947, Sect. 47-225).

This lack of guidelines for judicial review has also caused confusion and litigation. R.C.M. 1947, Section 66-1509 provides for judicial review of orders of the State Board of Pharmacy. It provides for the filing of a petition for review, but gives no guidelines for the court to follow in carrying out its review function. In Western Drug of Great Falls v. Grosman³⁷ an issue was raised as to whether a district court could hear new evidence in a review proceeding. The court said:

"Turning to the first specification of error, absent a specific authorization in the statute providing for judicial review that additional testimony may be received by the court, the district court was correct in its ruling. Ordinarily where additional testimony is received upon an appeal from an administrative action it is by virtue of a statutory provision. Insofar as the statute under consideration here is concerned in our opinion 'The word 'review', as used in this connection, means 'a judicial re-examination, as of the proceedings of a lower court by a higher'. . ."

Any person who feels aggrieved by a decision of the State Board of Registration for Professional Engineers and Land Surveyors may "appeal" and have a "full hearing" by the reviewing court. R.C.M. 1947, Sect. 66-2345. No mention is made of new evidence. The difference in language between this

statute and the statute for review of decisions of the State Board of Pharmacy raises questions. Under Section 66-2345 is a party entitled to submit new evidence to the court in view of the right to a "full hearing"? Or, must review be based upon the record made before the agency because there is no specific provision in the statute for admission of new evidence? In Heldenbrand v. Board of Registration for Professional Engineers and Land Surveyors³⁸ the Supreme Court made the following comment about the lack of guidelines in Section 66-2345:

"The right of appeal is not regarded nugatory because the statute does not specifically prescribe rules to guide the district court in trying such an appeal. 'Awkward, difficult, and unsatisfactory as a trial of this case in the district court might, and doubtless would, be, we are of the opinion that the learned district judge would be able to devise ways and means not incompatible with the Code for disposing of the case.' " (Emphasis added)

Other statutes provide for trial de novo in the district courts. Agencies having such statutes include, the Industrial Accident Board (R.C.M. 1947, Sect. 92-834), the State Electrical Board (R.C.M. 1947, Sect. 66-2813), the Oil and Gas Conservation Commission (R.C.M. 1947, Sect. 60-135), the State Board of Dental Examiners (R.C.M. 1947, Sect. 66-911), the Investment Commissioners (R.C.M. 1947, Sect. 40-2725(4)), and the State Board of Barber Examiners (R.C.M. 1947, Sect. 66-4031). However, "trial de novo" has no common meaning. Each statute seems to reflect a different concept of the term. A comparison of the statutes for three agencies will demonstrate this point.

R.C.M. 1947, Section 60-135 provides for judicial review of orders of the Oil and Gas Conservation Commission by suit for injunction. Such suits:

"... shall be tried de novo and disposed of as an ordinary civil suit, and not upon the record of any hearing or hearings before the commission, if any be held. The statute, rule, regulation, or decision involved in such suit shall be prima facie valid; however, the finding of fact, actual or presumed,

made by the commission in support of the rule, regulation, order, or decision involved in such suit shall not be binding on the court though supported by evidence introduced at a hearing or hearings before the commission. The court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any commission action." (Emphasis added)

Provision for judicial review for decisions of the Board of Barber Examiners is found in R.C.M. 1947, Section 66-403. The reviewing court has jurisdiction:

"... to hear and determine said petition in a summary manner, and to reverse, vacate or modify the order of the board of barber examiners complained of, if upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable. The trial of the district court upon such an appeal shall be de novo." (Emphasis added)

R.C.M. 1947, Section 92-834 states as follows with regard to judicial review of decisions of the Industrial Accident Board:

"Said appeal shall be taken by serving a written notice of said appeal upon the chairman of such industrial accident commission, or upon any other member thereof, . . . Immediately upon service upon said board of said notice, the said board shall certify to said district court the entire record and proceedings, including all testimony and evidence taken by said board, with the clerk of said district court The court may, upon the hearing, for good cause shown, permit additional evidence to be introduced, but, in the absence of such permission from the court, the cause shall be heard on the record of the board, as certified to the court by it. The trial of the matter shall be de novo, and upon such trial the court shall determine whether or not the board regularly pursued its authority, and whether or not the findings of the board ought to be sustained, and whether or not such findings are reasonable under all the circumstances of the case." (Emphasis added)

The circumstances under which new evidence may be admitted before the reviewing court has been the subject of extensive litigation. District Court Judicial Review in Montana Workmen's Compensation Cases, 30 Mont. L.R. 167, 171-177.

The foregoing statutes demonstrate three different approaches to de novo review. The first contemplates review on an entirely new record made before the reviewing court. The record made before the agency is disregarded. The second appears to contemplate review on the basis of the record made before the agency. The third contemplates review on the basis of the record made before the agency, plus such additional evidence as the court will permit.

Some statutes specifically provide for review on the basis of the record made before the agency and do not permit the court to take additional evidence or consider the evidence de novo. R.C.M. 1947, Section 918(b) relates to judicial review of decisions of the Montana Livestock Commission. It provides that review shall be based upon the record made before the Commission and "there shall not be any additional evidence introduced or anything in the nature of trial de novo." The reviewing court may not substitute its discretion for that of the Commission, but shall determine whether the Commission acted capriciously, arbitrarily, or abused its discretion and whether it acted according to law.

Judicial review for decisions of the Montana Real Estate Commission is obtained by writ of certiorari (R.C.M. 1947, Sect. 66-1939). The reviewing court has the authority to permit new evidence, but such evidence must be presented to the agency and the agency has an opportunity to modify its decision. However, the statute gives little in the way of guidelines as to the scope of review. It states that the court "shall review the record, and after hearing thereon, make its determination of the cause."

R.C.M. 1947, Section 87-108(d), relating to judicial review decisions of the Employment Security Commission, provides:

"... the Commission shall certify and file with said court all documents and papers and a transcript of all testimony taken in the matter, together with its findings of fact and decision therein. . . . In any judicial proceeding under this section, the findings of the Commission as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive and the jurisdiction of said court shall be confined to questions of law."

The words "supported by evidence" have been construed to mean "not a mere scintilla but substantial evidence." Jordan v. Craighead, 114 Mont. 337, 342, 136 P.2d 526 (1943). However, the reviewing court may not balance conflicting evidence or substitute its judgment for that of the Commission. Noone v. Reeder, 151 Mont. 248, 441 P.2d 309 (1968).

Still other statutes are ambiguous as to the precise mode and scope of review. Judicial review for the Montana Board of Hearing Aid Dispensers is governed by R.C.M. 1947, Section 66-3023, which provides that an aggrieved party may "petition for review of questions of law involved in the decision in the manner provided by law;" that the Board shall certify to the court in which the proceeding is pending questions of law involved in its decision; and that "the judge of the district court may consider evidence outside of the record." This language raises a question as to whether the court has jurisdiction to review findings of fact. The language of the statute would seem to restrict review to questions of law. However, the reference to consideration of evidence outside the record conflicts with this language and would suggest that the court may consider factual determinations, and that there is, at least to that extent, de novo review.

R.C.M. 1947, Section 66-1836(j) provides for judicial review of decisions of the State Board of Public Accountancy. This statute states:

"The Board shall certify and file with the court a transcript of the record upon which the order complained of was entered. The case shall then be tried; new evidence may be introduced and; briefs may be filed as in an ordinary case at law. The court may affirm, modify or set aside the Board's order in whole or in part, or may reman the case to the Board for further evidence, and may, in its discretion, stay the effect of the Board's order pending its determination of the case. The court's decision shall have the force and effect of a decree in equity." (Emphasis added)

This statute appears to provide for de novo review, at least to the extent that new evidence may be considered. What precisely is meant by the reference to a decree in equity in the final sentence is unclear to the author.

The foregoing discussion provides some insight to the varying approaches taken to judicial review agency statutes. This inconsistency creates problems for the courts, which must handle judicial review of decisions of all agencies, and for parties who seek review of administrative decisions. In 1940, before passage of the Federal Administrative Procedure Act, the following statement was made by a noted author and commentator about judicial review among federal agencies:

"No one can defend today our variegated scheme for judicial review of administrative action."³⁹

This remark applies with equal force to judicial review in the state of Montana today.

MAPA Recommendations

Section 308 of the MAPA (Appendix I, p. 18-21) provides for judicial review of agency decisions. In some respects it is patterned after Section 15 of the Revised Model Act. However, there are a number of significant changes and additions.

Unlike Section 15(a) of the Revised Model Act, Section 308(a) provides that the method of review contained in the MAPA shall be the sole mode of

review available, and that preexisting statutory and common law methods of review are eliminated. It is the author's conclusion that there is no justification for perpetuating the lack of uniformity in judicial review for decisions of state agencies. One clear, uniform mode of review for all agencies will greatly simplify and improve this vital aspect of state administrative procedures.

De novo review is abolished along with other preexisting forms of review because it is felt that it causes wasteful and costly duplication of effort by courts and agencies. If a party can present a new or substantially different case to a court than was presented to the agency, there is no real purpose for having the agency hearing at all. Such procedures encourage parties to withhold evidence at the agency hearing so as not to fully advise the opposition of their case. Orderly administrative procedures should foreclose such practices. The procedural safeguards set forth in the contested case sections of the MAPA should eliminate any need that may previously have existed for de novo review. The Idaho Administrative Procedure Act has been criticized for retaining de novo review.⁴⁰

Section 308(a) also provides that, absent of showing of good cause, a party may not raise an issue before the reviewing court which was not raised before the agency. This insures that the agency will be apprised of and have an opportunity to rule on all issues. There is no comparable provision in the Revised Model Act. Section 308(a) is patterned after Section 306(a) of Senate Bill No. 179 (Appendix III, p. 10-11).

The first paragraph of Section 308(b) is similar to Section 15(b) of the Revised Model Act, providing for the time and place of filing a petition for review. The Revised Model Act does not give guidance with

regard to the allegations which should be contained in a petition for review. It is believed that minimum requirements should be stated by statute. This is done in the second paragraph in Section 308(b).

Section 308(c) of the MAPA is substantially the same as Section 15(c) of the Revised Model Act, however, the words "unless otherwise provided by statute" have been added to the first sentence relating to stays. This language is added because several state statutes provide for automatic stays during the judicial review process.

Subsections (d), (e), (f) and (g) of Section 308 are patterned after the same sub-sections of Section 14 of the Revised Model Act. One significant addition has been made. A seventh basis for reversing or modifying an agency decision has been added:

"Because findings of fact, upon issues essential to the decision, were not made although requested."

This addition was taken from the Oklahoma Administrative Procedure Act.⁴¹

The significant features of the judicial review provisions in Section 308 are the following. One mode of review is provided for all agencies and all preexisting forms of review are abolished. Review is based upon the record made before the agency. The reviewing court may permit a party to submit additional evidence regarding the merits of the case. However, such evidence is to be heard and considered by the agency before being submitted to the court. The court may hear evidence relating to alleged procedural irregularities before the agency which does not appear in the record. The reviewing court may not substitute its judgment for that of the agency as to the weight of evidence on questions of fact. However, the court may reverse or modify an agency's determination if such findings are "clearly erroneous in view of the reliable, probative, and substantial evidence

in the record as a whole." The specific grounds for challenging an agency's decision are set forth in sub-section (g).

The method and scope of judicial review is clearly outlined in Section 308 of the MAPA for the courts, agencies and parties alike. This single method of review will permit the courts to apply uniform standards and procedures in all cases, thus simplifying and expediting their function.

D. GENERAL MATTERS

1. Declaratory Rulings and Judgments

(a) Declaratory Rulings by Agencies

Section 8 of the Revised Model Act (Appendix II, p. 5) requires that each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or any rule or order of the agency. Such declaratory rulings have the same status as agency decisions or orders in contested cases.

It is not uncommon for an individual to be uncertain as to whether particular activity which he contemplates would violate a statute or an agency rule or order. A dilemma results; forego the activity and avoid the potential problem, or engage in the activity and risk the consequences of violating a statute rule or order. Section 8 of the Revised Model Act is intended to eliminate the injustices created by such dilemmas by providing a procedure for agencies to make declaratory rulings.

Section 401 of the MAPA (Appendix I, p. 22) is the same as Section 8 of the Revised Model Act, with one exception. The final sentence of Section 8 reads: "Rulings disposing of petitions have the same status as agency decisions or orders in contested cases." The following sentence has been substituted in Section 401 of the MAPA: "A declaratory ruling, or the refusal to issue such a ruling, shall be subject to judicial review in the same manner as decisions or orders in contested cases." This change has been made to insure that agencies do not have unlimited discretion in refusing to make declaratory rulings.

The drafters of the Revised Model Act considered a requirement that declaratory rulings be made upon request of an interested party. 1 Cooper, State Administrative Law, 242-243. They concluded that this would place an impractical burden upon agencies. It is felt that this conclusion is justified. However, it is also believed that the modification of the declaratory ruling section described above will insure that declaratory rulings will be issued where the circumstances warrant.

(b) Declaratory Judgments on Validity or Application of Rules

Section 7 of the Revised Model Act (Appendix II, p. 4) provides that the validity or application of a rule may be determined by a court in an action for declaratory judgment if it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff.

Section 402 of the MAPA (Appendix I, p. 22) is the same as Section 7 of the Revised Model Act, with one exception. Section 402 provides that the court may act when it is "found", rather than "alleged", that the rule or its threatened application will impair legal rights or privileges. It is felt that the court's authority to act should be based upon a finding, rather than a mere allegation.

The authority conferred by this section is probably available under Montana's Uniform Declaratory Judgment Act, R.C.M., 1947, Sect. 93-8901-8916; State ex rel. Fulton v. District Court, 139 Mont. 573, 366 P.2d 435 (1961). However, it is deemed advisable to include this section in the MAPA to insure that the procedure is available.

2. Subpoenas and Enforcement; Compelling Testimony

The Revised Model Act does not contain provisions for agency subpoenas, enforcement of subpoenas, or compelling witnesses to testify in response to proper inquiries in agency proceedings. It is felt that this is a serious omission. If an agency is to properly perform a contested case function it must have these powers.⁴² The right to subpoenas and to compel testimony must be available to parties appearing before an agency as well as the agency itself.⁴³ The usefulness of the power to compel the furnishing of information is not limited to the contested case function. It should also be available to agencies in the rule-making process, the importance of which has already been discussed.

A number of statutes for state agencies provide for subpoena power. However, many statutes are silent in this regard, leaving the agencies without the power to fully perform the functions which have been assigned to them. Agencies do not possess inherent power to issue subpoenas and may not do so unless authorized by statute.⁴⁴

The type of problem which could arise from passage of a state administrative procedure act without a provision for these powers is demonstrated by a recent Nevada case. Andrews vs. Nevada Board of Cosmetology, 467 P.2d 96 (Nev., 1970). It is a familiar and well-established principle that administrative agencies have only those powers which are expressly or impliedly conferred by statute. Applying this principle in a license revocation proceeding, the Nevada Court ruled that the State Board of Cosmetology had no authority to issue subpoenas because the statute creating the agency did not grant that authority. The Court refused to imply subpoena power from the provisions of the State's Administrative Procedure Act, which is like the

Revised Model Act. The Court held that the person whose license was subject to being revoked had no right to a subpoena to compel the attendance of witnesses at the agency hearing. The problem created by this situation is demonstrated by the following comment by the Chief Justice in his concurring opinion:

"I concur in the majority opinion and add these additional comments: Petitioner's occupation is a lawful one and she may not be deprived of that right by revocation or suspension of her license except through due process of law. Should she be prevented from presenting her defenses to the charge through inability to compel attendance of witnesses or otherwise secure their testimony because of lack of subpoena power, due process may be violated."

Section 403 of the MAPA, (Appendix I, pgs. 22, 23) gives state agencies subpoena power and provides for enforcement of subpoenas and compelling of testimony. Section 403(a) gives agencies subpoena power in rule-making and contested case proceedings. In contested case proceedings, parties are entitled ^{to} ~~to~~ subpoenas upon request.

Section 403(b) provides a means for enforcement of subpoenas and requiring witnesses to testify where their refusal is unjustified. Where the agency refuses to act for such enforcement, the procedure is available to the party who seeks the information.

3. Representation Before Agencies

The Revised Model Act does not contain a provision relating to a person's right to counsel when appearing before an agency. The commissioners deemed it unnecessary to include this provision because of the wide-spread recognition of this right. 1 Cooper, State Administrative Law, 328-329.

* The statutes for many state agencies specifically provide for the right

to counsel. Many statutes are silent. It is felt that the right should be uniformly recognized for all state agencies and, accordingly, it has been specifically provided for in Section 404 of the MAPA (Appendix I, pgs. 23, 24).

E. COVERAGE OF THE MONTANA ADMINISTRATIVE PROCEDURES ACT

The Revised Model Act

Section 1(1) of the Revised Model Act (Appendix II, p. 1) defines "agency" and establishes the coverage of the act. The Revised Model Act applies to "each state (board, commission, department, or officer), other than the legislature or the courts, authorized to make rules or to determine contested cases." The definition excludes agencies of local government, which ordinarily would be covered if the definition did not contain the word "state." Plath v. Hi-Ball Contractors Inc., 139 Mont. 263, 362 P. 2d 1021 (1961). Also excluded are the judicial and legislative branches of government. Finally, the definition excludes from coverage agencies which do not have rule-making or contested case functions. Many state bodies, which may commonly be thought of as administrative agencies, act only in an advisory capacity and, therefore, do not have functions which are covered by an administrative procedure act.

The Commissioners on Uniform State Laws have taken the approach that the coverage of an administrative procedure act should be "all inclusive." This is consistent with the purpose of the Revised Model Act, which is to provide basic guidelines and procedures which are appropriate for all agencies, whether they be large or small. These procedures relate to functions that agencies have: quasi-legislative rule-making, and quasi-judicial adjudication. The guidelines and protections in the act should apply where the functions exist within any agency.

The Commissioners have recognized that local circumstances may warrant other exclusions from coverage. This, of course, is left to the judgment of the respective legislatures considering legislation in this area.

MAPA Recommendations

It is the author's conclusion that the coverage of the MAPA should be as broad as possible. However, it is felt that there are some state bodies and officers and some functions of agencies which should be exempt from coverage. These exceptions have been sparingly made, and only on the basis of a conclusion that the purpose of the agency or function is somehow inconsistent with the application of the provisions of the MAPA. Some states have made certain agencies exempt because they have established procedures of long-standing which are understood by those people who regularly practice before the agencies. I do not believe that this is a proper basis for making an exception. Inadequate and less desirable procedures should not be perpetuated merely because they are well established. Such an approach would undermine the effectiveness of the administrative reform which the MAPA is intended to accomplish. Experience in other states has been considered in recommending exception from coverage in the MAPA.

The exclusions from coverage of the MAPA are set forth in Section 102(a) defining "agency" (Appendix I, p. 1) and section 102(b) defining "rule" (Appendix I, p. 2). The exceptions are discussed below.

Exceptions from the Definition of "agency"

(a) Agencies of local government

Like the Revised Model Act, the MAPA exempts from coverage agencies of local government. While these agencies in many instances possess functions which are covered by the act, it is felt that at this time the MAPA should be confined to state agencies. After there has been experience with the MAPA the legislature may well consider a broadened application of the act.

- (b) The legislature and any branch, committee, or officer thereof; and the judicial branches and any committee or officer thereof.

This definition, follows the pattern of the Revised Model Act in exempting these two Constitutional branches of government:

- (c) The governor, except that any agency otherwise covered by this act shall not be exempt because the governor has been designated as a member thereof.

A literal reading of the definition of "agency" in the Revised Model Act might warrant the conclusion that the term includes the Governor. In order to avoid such a construction, some states, including Georgia, Indiana and Massachusetts have expressly excluded the office of Governor from the definition of agency.⁴⁵ The New York State Law Revision Commission has recommended exclusion of "the governor" from the coverage of its proposed act.⁴⁶

It is believed that the Governor, as head of one of the third constitutional branches of government, should be exempt from the provisions of the MAPA. However, the Governor has been designated to act as a member of several boards, including the Board of Land Commissioners. Mont. Const. Art. XI, Sect. 4, R.C.M., 1947, Sect. 81-103. The coverage of this agency should not be effected by virtue of the fact that the Governor has been so designated. Accordingly, a blanket exemption for the Governor is not deemed advisable for Montana.

- (d) The state military establishment and agencies concerned with civil defense and recovery from hostile attack.

Exemptions for a state's military establishment are common. States having such exemptions include the following: Colorado, Connecticut, Florida,

Georgia, Indiana, Massachusetts, Nebraska, Oklahoma, Washington and Wisconsin.⁴⁷ The New York Law Revision Commission has recommended such an exemption for the New York Act.⁴⁸ The definition of "agency" in Hawaii's administrative procedure act does not contain an exception for the military. However, after seven years of experience with the act the Hawaii Legislative Reference Bureau has recommended that "rules relating to military and naval affairs" be exempt from the coverage of the state's act.⁴⁹

In view of the unique function of the state's military establishment, it is recommended that it be excluded from the coverage of the MAPA. The Montana Civil Defense Act (R.C.M. 1947, Sect. 77-103 et seq.) and the Post-Attack Resource Management Act (R.C.M. 1947, Sect. 77-1501 et seq.) relate to functions which are under the direction of or closely related to the functioning of the military establishment. The Montana Civil Defense Act creates a civil defense agency which is within the Adjutant General's department. The purpose of the act is to deal with "disasters or emergencies of unprecedented size and destructiveness resulting from enemy attack, sabotage or other hostile action, and natural disasters . . . and generally to provide for the common defense to protect the public peace, health and safety and to preserve the lives and property of the people in this state. . . ." R.C.M. 1947, Sect. 577-1303. The Post-Attack Resource Management Act involves functions relating to recovery from hostile attacks on the United States. R.C.M. 1947, Sect. 77-1502. These agencies are excluded from the coverage of the act along with the military establishment.

- (e) The State Board of Pardons, except that the Board shall be subject to the requirements of sections 201 and 203 of this act and its rules and regulations shall be published in the Montana Administrative Code and Register.

Typically, state legislatures have delegated state pardon and parole boards functions which are highly discretionary in nature. As a result, it is common for such boards to be excluded from the coverage of state administrative procedure acts. States which have made such exemptions include: Georgia, Massachusetts, Maryland, Oklahoma, Oregon, and Washington.⁵⁰ Such an exemption has also been proposed by the New York Law Revision Commission.⁵¹

The Montana legislature has given the State Board of Pardons broad discretionary powers. For example, R.C.M. 1947, Section 94-9832 provides that a "prisoner shall be placed on parole only when the Board believes that he is able and willing to fulfill the obligations of a law abiding citizen." (Emphasis added) The orders of the Board are not reviewable, except with regard to compliance with the terms of the Probation, Parole and Executive Clemency Act under which the Board is created. R.C.M. 1947, Sect. 94-9824.

In view of the unique function of the Board, it is felt that an exemption from the coverage of the MAPA is warranted. However, the Board does have extensive power to adopt rules, including "rules . . . it may deem proper or necessary, with respect to the eligibility of prisoners for parole, the conduct of parole hearings or conditions to be imposed upon parolees" (R.C.M. 1947, Sect. 94-9832) and "rules for the conduct of persons . . . placed on parole or on probation under supervision of the Board by any court in the state and for the investigation and supervision of such persons" (R.C.M. 1947, Sect. 94-3837). There should be general public information with regard to the procedures which must be followed before the Board and the substantive rules which it has adopted. Accordingly, the exemption for the Board has been qualified by the requirement that it

must comply with the provisions of the MAPA relating to rules describing agency organization and procedures, public inspection of rules, and filing and effective date of rules. The rules must be published in the Montana Administrative Code and Register. The effect is to permit the Board to act with the degree of discretion which the legislature has prescribed and to provide adequate public information with regard to the procedures which must be followed before the Board and the rules which it has adopted.

- (f) The supervision and administration of any penal, mental, medical or eleemosynary institution with regard to the admission, release, institutional supervision, custody, control, care or treatment of inmates, prisoners or patients.

The matters covered by this exemption, to a large degree, are governed by statutes and are directly concerned with basic constitutional rights. Under the circumstances, it is believed that these matters are better left to courts of law rather than administrative bodies. In addition, it would not be practical to require that MAPA procedures be followed for many of the judgments and determinations which must be made in the course of administering and supervising such institutions, particularly when they relate to individual inmates, prisoners or patients.

States having similar exemptions include: Georgia, Indiana, Massachusetts, Oklahoma and Wisconsin.⁵² The New York Law Revision Commission has recommended that the state's Department of Correction be exempt from coverage.⁵³ The language of this exemption was patterned after the Oklahoma Administrative Procedure Act.⁵⁴

(g) The administration and management of educational institutions. Some states have exempted from coverage educational functions. For example, Georgia has exempted "any school, college, . . . or . . . educational

. . . institution" (Ga. Code, Sect. 3A-192(a)); Indiana has exempted state colleges and universities (Ind. Stat. Sect. 63-3002); Virginia has exempted "state board of education" and "department of education" (Va. Code Sect. 9-6.2(a)); and Oklahoma has been made exempt "the Board of Regents or employees of any university, college, or other institution of higher learning, except with respect to the expulsion of any student for disciplinary reasons" (75 Okla. Stat. Sect. 301(g)).

The ramifications of subjecting the state's educational institutions to the MAPA, in part or in whole, should be the subject of an independent study. At the present time the Legislative Council is studying state educational statutes and recommended changes. Under the circumstances, it is felt the administration and management of educational institutions should, at least for the time being, be exempt. This is a matter which can be reevaluated at a later date when the state has had experience with the MAPA and when the legislature has had an opportunity to fully evaluate current state laws and to make any changes which it deems warranted.

(h) The financing, construction and maintenance of public works. The New York Law Revision Commission has recommended that "agencies whose primary function is the financing, construction or maintenance of public works" be exempt from its proposed administrative procedure act.⁵⁵ The Oklahoma legislature has exempted the Oklahoma State Highway Commission from the coverage of its act. 75 Okla. Stat. Sect. 301(c). Oklahoma's exemption was made because of the fear that if the Highway Commission were covered federal aid monies might in some way be jeopardized.⁵⁶

There is good reasons to exempt functions relating to the financing, construction or maintainence of public works. The exercise of these functions should be free from the procedural requirements of the MAPA so

that construction and maintenance plans and schedules, financing plans and financial aids are not jeopardized. However, since such functions may be only a portion of an agency's overall function, it does not seem appropriate to exempt entire agencies. Nor does it seem appropriate to exempt only those agencies whose primary function deals with these matters. It is believed that the best approach is to exempt the function for all agencies that are otherwise covered by the MAPA.

Exemptions from the Definition of "rule"

- (a) Statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public; declaratory rulings issued pursuant to section 401 of the MAPA; and intra-agency memoranda.

These exemptions are the only ones which are contained in the Revised Model Act. Their purpose is to insure that agencies will not be unduly restricted regarding internal matters and to encourage agencies to utilize the practice of issuing declaratory rulings.

- (b) Rules relating to the use of public works, facilities, streets and highways, when the substance of such rules is indicated to the public by means of signs or signals.

The purpose of this exception is to exempt from rule-making procedures such matters as establishing or changing of speed limits on streets and highways, establishing or changing hours when public facilities are open to the public and similar functions. States which presently have similar exemptions include: Kentucky, Massachusetts, Virginia and Wisconsin.⁵⁷ The New York Law Revision Commission has proposed such an exemption⁵⁸ and the Hawaii Legislative Reference Bureau has proposed similar language as an amendment to the definition of "rule" in Hawaii's administrative procedure act.⁵⁹

- (c) Seasonal rules adopted annually relating to hunting, fishing, and trapping when there is a statutory requirement for the publication of such rules, and rules adopted annually relating to the seasonal recreational use of lands and waters owned or controlled by the state when the substance of such rules are indicated to the public by means of signs or signals.

The purpose of the first part of this exclusion is to exempt from rule-making procedures seasonal hunting, fishing and trapping promulgated by the Fish and Game Commission. Often such rules must be adopted on short notice or under circumstances where it would not be practical for the Commission to follow formal rule-making procedures. In addition, such rules are normally in effect for a shorter period than the 120 days permitted for emergency rules which may be adopted without notice or hearing under Section 102(b) of the MAPA. Statutes require that such rules be published by the agency so that there is adequate public notice. Parties wishing to challenge seasonal rules in the past have done so by bringing injunction proceedings in the district courts. This means of challenge will still be available. The exemption does not affect rules of a permanent nature (which are not intended to have merely seasonal application). MAPA procedure must be followed with regard to such rules.

The Fish and Game Commission and other state agencies have control over lands and waters which are used for recreational purposes. In some instances it is necessary to control access to such lands and waters due to fire hazard or other conditions on short notice. Accordingly, for the reasons stated above, an exemption is also made for the seasonal regulation of the recreational use of lands and waters controlled by state agencies, as long as the regulations are posted for the general public.

- (d) Rules relating to personnel standards, job classifications or salary ranges for agency employees.

The Hawaii legislature adopted a broad definition of "rule" similar to that in the Revised Model Act. The Legislative Reference Bureau reached the following conclusion in its report on compliance by state agencies with the provision of the act:⁶⁰

" . . . each job description of a position in the state government, as now published by the State Department of Personnel Services, could be considered a rule and thus be subject to the procedural requirements of the APA. Each job description can be classified as an agency statement of general or particular applicability with future effect that implements or interprets the personnel laws of the State. It is difficult to conceive that the legislature meant to have the APA apply to all such job descriptions. With over 12,000 positions under the civil service system, a tremendous administrative problem would be created if the job description of each position is required to be promulgated under the APA procedural requirements."

The Bureau has recommended that the following exception should be made to the definition of "rule": "Rules establishing personnel qualification standards for job classification for state or county employees who are classified by civil service."⁶¹

It would not be practical to have the establishment of personnel standards, job classifications and salary ranges for state agency personnel subject to rule-making procedures. To insure that they are not, a specific exemption is made to the definition of rule.

- (c) Uniform rules adopted pursuant to interstate compact, except that such rules shall be filed in accordance with section 302 of this act and shall be published in the Montana Administrative Code and Register.

Another problem which Hawaii has encountered with the broad definition of "rule" under the Hawaii administrative procedure act relates to rules and regulations adopted pursuant to interstate compacts. In its report on compliance, the Legislative Reference Bureau stated:⁶²



"The definition of agency is all inclusive This broad definition has created problems of compliance by certain agencies that, perhaps, were not contemplated when the APA was enacted. A case in point is the application of the APA to those agencies that are authorized by law to administer interstate compacts. These agencies include state officers and commissions in the following areas: Interstate Parole and Probation; Interstate Compact on Juveniles; Multistate Tax Commission; Western Interstate Commission for Higher Education; and the Compact on Mental Health. Since these officers and commissions are authorized by law to promulgate rules and regulations, they would clearly fall within the definition of an agency. As an agency, all procedural requirements of the APA must be complied with in the adoption of rules and regulations. These procedural requirements, however, if applied to the adoption of rules under the interstate compacts would defeat the intent of such compacts in that there would be no uniformity of rules among the participating states, for each state would then be required to comply with the provisions of the APA in their jurisdiction. All the interstate compacts heretofore mentioned are required for purposes of uniformity to have their rules approved by the interstate officers and commissions as a whole instead of by each state officer or commission individually."

It is believed that there is merit in the foregoing observations. If the rule-making requirements contained in the MAPA were applied to rules adopted pursuant to interstate compacts it would be inconsistent with the intent of the compacts to develop uniform rules in participating states. However, there is still a need for public information regarding these rules. The exception is qualified by the requirement that the rules shall be filed with the Secretary of State in the same manner as other rules and shall be published in the Montana Administrative Code and Register.

V.

CONCLUSION

The study of administrative procedures has revealed an urgent need for administrative reform in the State of Montana. There is a need for legislative guidance and direction that can only be achieved through the adoption of a comprehensive administrative procedure act. This conclusion is not only that of the author, but is shared by personnel within the state agencies.

Agencies were asked if they had any suggestions for the improvement of administrative procedures. A number of agencies suggested the adoption of a state administrative procedure act. A typical response came from the State Board of Equalization:

"Improvement could be brought about by more specific and detailed guidance from the Legislature."

This report contains a proposal to meet the need for reform which the study has revealed. The MAPA is patterned after model acts which have been adopted by, or used as a pattern by, many other states. There is experience to draw upon in applying the MAPA in Montana. With a few exceptions, provisions like those in the MAPA can be found somewhere in the Montana statutes. They are not unfamiliar or unusual. The MAPA merely provides for fairness and uniformity in state administrative procedures.

FOOTNOTES

1. Frank E. Cooper is an experienced practitioner and teacher in the area of administrative law. He participated in the drafting of the Revised Model State Administrative Procedure Act. His two-volume treatise on state administrative law provides excellent background with regard to the purpose for and meaning of the provisions of the Revised Model Act.
2. Wisconsin Legislative Council Report on Administrative Rule Making (1955), Volume II, Part II, p. 19. Wisconsin adopted its first Administrative Procedure Act in 1943 and has been a leader in the area of administrative procedure reform.
3. In 1939 the Governor of the State of New York commissioned Robert M. Benjamin to make a study of state administrative procedures. The Benjamin Report was the product of that study.
4. 1 Cooper, State Administrative Law, 13; Report and Recommendations relating to an Administrative Procedure Act, 1965 New York Law Revision Commission Report, 30; Ark. Stat. Ann., Section 5-107, et seq.; Fla. Stat. Ann., Section 120.11, et seq.; Ga. Code Ann., Section 3A-101, et seq.; Hawaii Revised Laws, Section 6C-1, et seq.; Session Laws of Idaho, 1965, Chapter 273; La. Rev. Stat., Section 49; 951, et seq.; Nev. Stat., Section 4-32-1, et seq.; 75 Okl. Stat., Section 301, et seq.; South Dakota Laws, Section 1-26-1, et seq.; 3 Vmt. Stat., Section 801, et seq.; W. Va. Code, Section 29A-1-1, et seq.; Wyo. Stat., Section 9-276.19, et seq.
5. A few states having no general Administrative Procedure Act have isolated statutory requirements relating to such things as authority to adopt rules and regulations, filing of rules and regulations and judicial review of agency decisions.
6. New York State Assembly Bill No. 6304-A (1969). This bill is the product of a study of administrative procedures started by the New York Law Revision Commission in 1962. The bill, which is patterned after the Revised Model Act and reports of the New York Law Revision Commission made in 1963, 1965 and 1966, has been considered in the present study.
7. 1 Cooper, State Administrative Law, 11.
8. 139 Mont. 523, 528, 374 P.2d 231 (1961).

9. 316 U.S. 407, 418 (1942).
10. 1 Cooper, State Administrative Law, 162-163.
11. Montana Department of Administrations, June 1970, list of names and addresses of State Agencies.
12. Ibid.
13. Wisconsin Legislative Council Report on Administrative Rule Making (1955), Volume II, Part II, p. 111.
14. Gifford, Report on Administrative Law to the Tennessee Law Revision Commission, 20 Vand. L. R. 777, 786.
15. Ibid: at 72.
16. Montana Commission on Executive Reorganization, Report on Professional and Occupational Licensing (Jan. 15, 1970)
17. Kentucky Legislative Research Commission Report No. 12, Administrative Procedure Law in Kentucky, 59 (1962); 20 Vand. L.R. 777, 789.
18. Montana Department of Administrations, June 1970, list of names and addresses of State Agencies.
19. Comparison of the Department's administration lists of names and addresses for agencies for the years 1968 and 1970.
20. Wisconsin Legislative Council Report on Administrative Rule Making (1955), Volume II, Part II, pgs. 9-11.
21. 11 Mont. 429, 434, 28 Pac. 643 (1892).
22. 133 Mont. 362, 369, 223 P.2d 1116 (1958)
23. Bennett v. Arizona State Board of Public Welfare, 95 Ariz. 170, 388 P.2d 166 (1964).
24. 147 Mont. at p. 55
25. Gifford, Report on Administrative Law to the Tennessee Law Revision Commission, 20 Vand. L.R. 777, 836-837; Idaho Administrative Agencies and the New Idaho Administrative Procedure Act, 3 Ida L.R. 63, 95-97; Harrison, The West Virginia Administrative Procedure Act, 66 WV L.R. 159, 181; Merrill, Oklahoma's New Administrative Procedure Act, 17 Okl. L.R. 1, 27; Bloomenthal, The Revised Model State Administrative Procedure Act -- Reform or Regression?, 1963 Duke L.J. 593, 610.

26. 20 Vand. L.R. 836, 837.
27. 3 Ida. L.R. 61
28. 3 Ida. L.R. 96, 97.
29. New York Assembly Bill No. 6304-A, Section 304.
30. 75 Okla. Stat., Section 316.
31. 1 Cooper, State Administrative Law, 441.
32. 154 Mont. 437, 465 P.2d 334 (1970)
33. 111 Mont. 384, 388; 112 P.2d 477 (1940).
34. 147 Mont. 51.
35. In the Bailey case the majority reversed the decision of the order. The dissenting judge would have affirmed the issuance of a writ of prohibition by the lower court.
36. 146 Mont. 115, 124; 404 P.2d 511 (1965).
37. 141 Mont. 8, 12; 347 P.2d 507 (1962)
38. 147 Mont. 271, 279; 411 P.2d 744 (1966).
39. Landis, Critical Issues in Administrative Law, 53 Harv. L.R. 1077, 1090 (1940)
40. 3 Ida. L.R. 63, 110.
41. 75 Okla. Stat., Section 322(1)(g).
42. 1 Davis, Administrative Law, Section 1.04, Pocket Part, p. 25.
43. Merrill, Oklahoma's New Administrative Procedure Act, 17 Okla. L.R. 1, 31; Gifford, Report on Administrative Law to the Tennessee Law Revision Commission, 20 Vand. L.R. 777, 872.
44. 1 Cooper, State Administrative Law, 295.
45. Ga. Code, Section 3A-102; Ind. Stat., Section 63-2002; Mass. Gen. Laws, Chapt. 30A, Section 1(2).
46. New York Assembly Bill 6304-A, Section 301.
47. Colo. Rev. Stat., Section 3-61-1; Fla. Stat., Section 120.021; Ga. Stat., Section 3A101; Ind. Stat., Section 63-3002; Mass. Gen. Laws, Chapt. 30A, Section 1(2); Neb. Rev. Stat., Section 84-901; 75 Okla. Stat., Section 301(1); Wash. Stat., Section 34.04.150; Wisc. Stat., Section 227.01(5).

48. New York Assembly Bill 6304-A, Section 103.
49. Legislative Reference Bureau Report, Compliance of State Agencies with Hawaii Procedure Act (1959), p. 53.
50. Ga. Stat., Section 3A-101; Mass. Gen. Laws, Chapt. 30A; Md. Code, Article 41, Section 244a; Okla. Stat., Section 301(1); Ore. Rev. Stat., Section 183.310; Wash. Stat., Section 34.04.150.
51. New York Assembly Bill 6304-A, Section 103.
52. Ga. Stat., Section 3A-101; Ind. Stat., Section 63-3002; Mass. Gen. Laws, Chapt. 30A; Okla. Stat., Section 301(1); Wisc. Stat., Section 227.01(5).
53. New York Assembly Bill 6304-A, Section 103.
54. 75 Okla. Stat., Section 301(f).
55. New York Assembly Bill 6304-A, Section 103.
56. Merrill, Oklahoma's New Administrative Procedure Act, 17 Okla. L.R. 1, 5.
57. Ky. Rev. Stat., Section 13.080; Mass. Gen. Laws, Chapt. 30A, Section 1(5); Va. Code, Section 59-6.2; Wisc. Stat., Section 277.01(5).
58. New York Assembly Bill 6304-A, Section 103.
59. Legislative Reference Bureau Report, p. 53.
60. Ibid at 4.
61. Ibid at 53.
62. Ibid at 2.

PROPOSED

MONTANA ADMINISTRATIVE PROCEDURE ACT

TITLE I - TITLE AND DEFINITIONS

Section 101. SHORT TITLE. This act shall be known and may be cited as the "Montana Administrative Procedure Act."

Section 102. DEFINITIONS. For purposes of this act:

(a) "agency" means any board, bureau, commission, department, authority or officer of the state government authorized by law to make rules and to determine contested cases, except that the provisions of this act shall not apply to the following:

- (1) the legislature and any branch, committee or officer thereof;
- (2) the judicial branches and any committee or officer thereof;
- (3) the governor, except that an agency otherwise covered by this act shall not be exempt because the governor has been designated as a member thereof;
- (4) the state military establishment and agencies concerned with civil defense and recovery from hostile attack;
- (5) the State Board of Pardons, except that said board shall be subject to the requirements of sections 201 and 203 of this act and its rules shall be published in the Montana Administrative Code and Register;
- (6) the supervision and administration of any penal, mental, medical or eleemosynary institution with regard to the admission, release, institutional supervision, custody, control, care or treatment of inmates, prisoners or patients;
- (7) the administration and management of educational institutions;
- (8) the financing, construction and maintenance of public works.

(b) "rule" means each agency regulation, standard or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency. The term includes the amendment or repeal of a prior rule, but does not include:

- (1) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public;
- (2) declaratory rulings issued pursuant to section 401 of this act;
- (3) intra-agency memoranda;
- (4) rules relating to the use of public works, facilities, streets, and highways, when the substance of such rules is indicated to the public by means of signs or signals;
- (5) seasonal rules adopted annually relating to hunting, fishing and trapping when there is a statutory requirement for the publication of such rules, and rules adopted annually relating to the seasonal recreational use of lands and waters owned or controlled by the state when the substance of such rules is indicated to the public by means of signs or signals;
- (6) rules relating to personnel standards, job classifications, or salary ranges for agency employees;
- (7) uniform rules adopted pursuant to interstate compact, except that such rules shall be filed in accordance with section 302 of this act and shall be published in the Montana Administrative Code and Register.

(c) "contested case" means any proceeding before an agency in which a determination of legal rights, duties or privileges of a party is required by law to be made after an opportunity for hearing. The term includes, but is not restricted to, rate-making, price-fixing and licensing.

(d) "license" includes the whole or part of any agency permit, certificate, approval, registration, charter or other form of permission required by law, but does not include a license required solely for revenue purposes.

(e) "licensing" includes any agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, limitation or amendment of a license.

(f) "party" means any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

(g) "person" means any individual, partnership, corporation, association, governmental subdivision, or public organization of any character other than an agency.

TITLE II - RULE MAKING

Section 201. RULES DESCRIBING AGENCY ORGANIZATION AND PROCEDURES; PUBLIC INSPECTION OF RULES; MODEL RULES.

(a) In addition to other rule-making requirements imposed by law, each agency shall:

(1) adopt as a rule a description of its organization, stating the

general course and method of its operations and the methods whereby the public may obtain information or make submissions or requests;

- (2) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency;
- (3) make available for public inspection all rules and all other written statements of policy or interpretations formulated, adopted, or used by the agency in the discharge of its functions;
- (4) upon request of any person or agency, provide a copy of any rule. Unless otherwise provided by statute, an agency may require the payment of the cost of providing such copies.

(b) No agency rule shall be valid or effective against any person or party whose rights have been substantially prejudiced by an agency's failure to comply with the public inspection requirement herein.

(c) The attorney general shall prepare, as soon as is practicable after the passage of this act, a model form for a rule describing the organization of agencies and model rules of practice for agencies to use as a guide in fulfilling the requirements of section 201(a). The attorney general shall add to, amend or revise the model rules from time to time as he shall deem necessary for the proper guidance of agencies. The model rules, and any additions, amendments or revisions thereto, shall be appropriate for the use of as many agencies as is practicable and shall be filed with the secretary of state and provided to any agency upon request. The adoption by an agency of all or part of the model rules shall not relieve the agency from following the rule-making procedures required by this act.

Section 202. ADOPTION; AMENDMENT OR REPEAL OF RULES; EMERGENCY RULES.

(a) Prior to the adoption, amendment or repeal of any rule, the agency shall:

- (1) give written notice of its intended action. The notice shall include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, and the time when, place where, and manner in which interested persons may present their views thereon. The notice shall be filed with the secretary of state for publication in the Montana Administrative Register as provided in section 204(b) of this act and mailed to all persons who have made timely requests to the agency for advance notice of its rule making proceedings. The notice shall be published and mailed at least twenty (20) days in advance of the agency's intended action. If any statute shall provide for a different method of publication, the affected agency shall comply with the statute in addition to the requirements contained therein. However, in no case shall the notice period be less than twenty (20) days.
- (2) afford all interested persons reasonable opportunity to submit data, views, or argument orally or in writing. In the case of substantive rules, opportunity for oral hearing shall be granted if requested by either ten (10) per cent or twenty-five (25) of the persons who will be directly affected by the proposed rule, by a governmental subdivision or agency or by an association having not less than twenty-five (25) members who will be directly affected. Contested case procedures need not be followed in hearings held pursuant to this section. Where a hearing is otherwise

required by statute, nothing herein shall be deemed to alter that requirement. The agency shall consider fully all written and oral submissions respecting the proposed rule. Upon adoption of a rule, an agency, if requested to do so by an interested person either prior to adoption or within thirty (30) days thereafter, shall issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for over-ruling the considerations urged against its adoption.

(b) If an agency finds that an imminent peril to the public health, safety or welfare requires adoption of a rule upon fewer than twenty (20) days notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule. The rule may be effective for a period not longer than one hundred and twenty (120) days, but the adoption of an identical rule under subsections (a)(1) and (a)(2) of this section is not precluded. The sufficiency of the reasons for a finding of imminent peril to the public health, safety or welfare shall be subject to judicial review.

(c) No rule adopted after the effective date of this act shall be valid unless adopted in substantial compliance with subsection (a) and (b) of this section. A proceeding to contest any rule on the ground of noncompliance with the procedural requirements of this section must be commenced, or any defense contesting a rule on such grounds must be raised, within two (2) years from the effective date of this rule.

(d) An agency may use informal conferences and consultations as a means of obtaining the viewpoints and advice of interested persons with respect to contemplated rule making. An agency may also appoint committees of experts

or interested persons or representatives of the general public to advise it with respect to any contemplated rule making. The powers of such committees shall be advisory only. Nothing herein shall relieve the agency from following rule-making procedures required by this act.

(e) Rules shall not unnecessarily repeat statutory language. Whenever it is necessary to refer to statutory language in order to convey the meaning of a rule interpreting the language, the reference shall clearly indicate that portion of the language which is statutory and the portion which is amplification of the language. Each rule shall include a citation of authority pursuant to which it, or any part thereof, is adopted.

(f) Each agency shall at least annually review its rules to determine if any new rule should be adopted or any existing rule should be modified or repealed.

Section 203. FILING OF RULES; EFFECTIVE DATE OF RULES.

(a) On or before the sixtieth day following the effective date of this act, each agency shall file with the secretary of state a certified copy of each rule adopted by it on or before the effective date of this act and remaining in effect. Any rule not so filed shall be deemed to have been abrogated by the agency and shall be void and of no effect.

(b) Each agency shall file with the secretary of state a certified copy of each rule adopted by it subsequent to the effective date of this act. Each such rule shall become effective ten (10) days after publication thereof in the Montana Administrative Register or Code as provided in section 204 of this act, except that:

- (1) if a later date is required by statute or specified in the rule, the later date shall be the effective date;
- (2) subject to applicable constitutional or statutory provisions, an

emergency rule shall become effective immediately upon filing with the secretary of state, or at a stated date less than ten (10) days following publication in the Montana Administrative Code or Register, if the agency finds that this effective date is necessary because of imminent peril to the public health, safety or welfare. The agency's finding and a brief statement of reasons therefor shall be filed with the rule. The agency shall take appropriate measures to make emergency rules known to every person who may be affected by them.

(c) The secretary of state may prescribe a format, style and arrangement for rules which are filed pursuant to this act and may refuse to accept the filing of any rule that is not in substantial compliance therewith. He shall keep and maintain a permanent register of all rules filed (including superseded and repealed rules), which shall be open to public inspection, and shall provide copies of any rule upon request of any person or agency. Unless otherwise provided by statute, the secretary of state may require the payment of the cost of providing such copies.

Section 204. PUBLICATION AND DISTRIBUTION OF RULES AND NOTICES.

(a) The secretary of state shall, as soon as is practicable after the effective date of this act, compile, index and publish all rules filed pursuant to this act in a publication which shall be known as the Montana Administrative Code (herein referred to as the Code). The Code shall be printed or otherwise duplicated, in loose-leaf form. The secretary of state shall revise the Code, or any part thereof, as often as he deems necessary.

(b) The secretary of state shall monthly compile and publish the Montana Administrative Register (herein referred to as the Register). The Register shall contain two sections, a Rules Section and a Notice Section.

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Section 204. PUBLICATION AND DISTRIBUTION OF RULES AND NOTICES.

(a) The secretary of state shall, as soon as is practicable after the effective date of this act, compile, index and publish all rules filed pursuant to this act in a publication which shall be known as the Montana Administrative Code (herein referred to as the Code). The Code shall be printed or otherwise duplicated, in loose-leaf form. The secretary of state shall revise the Code, or any part thereof, as often as he deems necessary.

(b) The secretary of state shall monthly compile and publish the Montana Administrative Register (herein referred to as the Register). The Register shall contain two sections, a Rules Section and a Notice Section.

(c) The secretary of state, with the consent of the adopting agency, may omit from the Code or Register any rule the publication of which would be unduly cumbersome, expensive or otherwise inexpedient, if the rule in printed or duplicated form is made available on application to the agency, and if the Code or Register contains a notice stating the general subject matter of the omitted rule and stating how a copy thereof may be obtained.

(d) The Code shall be arranged, indexed and printed or duplicated in such manner as to permit separate publication of portions thereof relating to individual agencies. An agency may make arrangements with the secretary of state for the printing of as many copies of such separate publications as it may require. The cost of any such separate publications shall be paid by the agency.

(e) The secretary of state shall distribute copies of the Code, revisions thereto and the Register without charge to the following:

Attorney general, 1 copy

Clerk of each court of record of this state, 1 copy

Clerk of United States district court for the district of Montana,
1 copy

Clerk of United States court of appeals for the ninth circuit, 1 copy

Each county clerk of this state, for use of county officials

and the public, 1 copy

State law library, 1 copy

State historical society, 1 copy

Each unit of the university of Montana, 1 copy

Law library of the university of Montana, 1 copy

Montana legislative council, 3 copies

Library of congress, 1 copy

State law library, for such exchanges as it may establish with

libraries of other state, not to exceed fifty (50) copies

Law library of the university of Montana, for such exchanges as

it may establish with institutions of higher education in

other states, not to exceed fifty (50) copies

The secretary of state, clerk of each court of record in the state, clerk of each county in the state and the librarians for the state law library and the university of Montana law library shall maintain a complete, current set of the Code, including revisions thereto and additions or changes published in the Register. Such persons shall also maintain a file of rule-making notices published in the Register during the preceding two (2) years. The secretary of state shall also maintain a permanent Register of rule-making notices.

(f) The secretary of state shall make copies of and subscriptions to the Code, revisions thereto, and the Register available to any person at prices fixed to cover publication and mailing costs.

(g) The secretary of state shall determine the cost of supplying copies of the Code, revisions thereto and the Register. Such cost shall be the approximate cost of printing or duplicating and mailing. However, a uniform price per page or group of pages may be established without regard to differences in cost of printing different parts of the Code, revisions thereto, and the Register.

Section 205. PETITION FOR ADOPTION OF RULES.

An interested person may petition an agency requesting the promulgation, amendment, or repeal of a rule. Each agency shall prescribe by rule the form for petitions and the procedure for their submission, consideration,

and disposition. Within sixty (60) days after submission of a petition, the agency either shall deny the petition in writing (stating its reasons for the denial) or shall initiate rule-making proceedings in accordance with section 202 of this act.

Section 206. JUDICIAL NOTICE OF RULES.

The courts shall take judicial notice of any rule filed and published under the provisions of this act.

TITLE III - CONTESTED CASES

Section 301. NOTICE; HEARING; RECORD.

(a) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

(b) The notice shall include:

- (1) a statement of the time, place, and nature of the hearing;
- (2) a statement of the legal authority and jurisdiction under which the hearing is to be held;
- (3) a reference to the particular sections of the statutes and rules involved;
- (4) a short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished.

(c) Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

(d) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

(e) The record in a contested case shall include:

- (1) all pleadings, motions, intermediate rulings;
- (2) all evidence received or considered, including a stenographic record of oral proceedings;
- (3) a statement of matters officially noticed;
- (4) questions and offers of proof, objections, and rulings thereon;
- (5) proposed findings and exceptions;
- (6) any decision, opinion, or report by the hearing examiner or agency member presiding at the hearing;
- (7) all staff memoranda or data submitted to the hearing examiner or members of the agency as evidence in connection with their consideration of the case.

(f) The stenographic record of oral proceedings or any part thereof shall be transcribed on request of any party. Unless otherwise provided by statute, the cost of the transcription shall be paid by the requesting party.

(g) Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

Section 302. RULES OF EVIDENCE; OFFICIAL NOTICE.

(a) Except as otherwise provided by statute, agencies shall not be bound by common law or statutory rules of evidence. They may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence.

Hearsay evidence may be admitted for the purpose of supplementing or explaining any direct evidence, but shall not be sufficient in itself to support a finding unless it would be admissible over objection for such purposes in civil actions. Objections to evidentiary offers may be made and shall be noted in the record. When a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form.

(b) Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original.

(c) A party shall have the right to conduct cross-examinations required for a full and true disclosure of facts, including the right to cross-examine the author of any document prepared by or on behalf of or for the use of the agency and offered in evidence.

(d) Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence.

Section 303. HEARING EXAMINERS; CONDUCT OF HEARINGS; DISQUALIFICATION OF HEARING EXAMINERS AND AGENCY MEMBERS.

(a) An agency shall have authority to appoint hearing examiners for the conduct of hearings in contested cases.

(b) Agency members or hearing examiners presiding over hearings shall be authorized to administer oaths or affirmations; issue subpoenas pursuant to section 403 of this act; provide for the taking of testimony by deposition; regulate the course of hearings, including setting the time and place for continued hearings and fixing the time for filing of briefs or other documents; and direct parties to appear and confer to consider simplification of the issues by consent of the parties. All testimony shall be given under oath or affirmation.

(c) A hearing examiner or agency member shall withdraw from any contested case in which he cannot give fair and impartial hearing or consideration. Any party may request the disqualification of a hearing examiner or agency member on the ground of his inability to give a fair and impartial hearing or consideration by filing an affidavit, promptly upon discovery of the alleged disqualification, stating with particularity the grounds upon which the disqualification is claimed. The issue shall be determined promptly. If the charge is against a hearing examiner, the issue of disqualification shall be determined by the agency. If it is against a member of the agency, it shall be decided by the remaining members of the agency. If it affects all or a majority of the members of the agency, the issue shall be determined, upon petition filed by the agency, by the district court where the hearing is being held, if the hearing is in progress, and, if the hearing is not in progress, by the district court for the county where the agency has its principal office. Upon

the entry of an order of disqualification affecting a hearing examiner, the agency shall assign another in his stead or shall conduct the hearing itself. Upon the disqualification of a member of an agency, the governor immediately shall appoint a member pro tem to sit in place of the disqualified member in that proceeding.

Section 304. EXAMINATION OF EVIDENCE BY AGENCY; PROPOSED ORDERS.

When in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served upon the parties, and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision. The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact or law necessary to the proposed decision, prepared by the person who conducted the hearing or one who has read the record. The parties by written stipulation may waive compliance with this section.

Section 305. FINAL ORDERS; NOTIFICATION.

(a) A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed

findings of fact, the decision shall include a ruling upon each proposed finding. Parties shall be notified either personally or by mail of any decision or order. Upon request, a copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.

(b) Each agency shall index and make available for public inspection all final decisions and orders, including declaratory rulings under section 401, issued after the effective date of this act. No such agency decision or order shall be valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection as herein required. This provision is not applicable in favor of any person or party who has actual knowledge thereof or when a state statute or federal statute or regulation prohibits public disclosure of the contents of a decision or order.

Section 306. EX PARTE CONSULTATIONS.

Unless required for the disposition of ex parte matters authorized by law, members, hearing examiners or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not, after issuance of notice of hearing, communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. An agency member -

- (a) may communicate with other members of the agency, and
- (b) may have the aid and advice of one or more personal assistants.

Section 307. LICENSES.

(a) When the grant, denial, renewal, revocation, suspension, annulment, withdrawal, limitation or amendment of a license is required by law to be preceded by notice and opportunity for hearing, the provisions of this act concerning contested cases apply.

(b) When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

(c) No revocation, suspension, annulment, withdrawal, or amendment of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

Section 308. JUDICIAL REVIEW OF CONTESTED CASES.

- (a) Any person aggrieved by a final decision in a contested case,

whether such decision is affirmative or negative in form, is entitled to judicial review thereof under this act. No other statutory, equitable or common law mode of review shall be available therefor, except to the extent that the decision may be reviewed in civil or criminal proceedings for enforcement thereof.

A party who proceeded before an agency under the terms of a particular statute shall not be precluded from questioning the validity of that statute on judicial review, but such party may not raise any other question not raised before the agency, unless it is shown to the satisfaction of the court that there was good cause for failure to raise the question before the agency.

(b) Proceedings for review shall be instituted by filing a petition in district court within thirty (30) days after service of the final decision of the agency, or if a rehearing is requested, within thirty (30) days after the decision thereon. Except as otherwise provided by statute, the petition shall be filed in the district court for the county where the petitioner resides or has his principal place of business, or where the agency maintains its principal office. Copies of the petition shall be promptly served upon the agency and all parties of record.

The petition shall include a concise statement of the facts upon which jurisdiction and venue are based, a statement of the manner in which the petitioner is aggrieved and the ground or grounds specified in subsection (g) of this section upon which the petitioner contends he is entitled to relief. The petition shall demand the relief to which the petitioner believes he is entitled, and the demand for relief may be in the alternative.

The court, in its discretion, may permit interested parties to intervene.

(c) Unless otherwise provided by statute, the filing of the petition shall not stay enforcement of the agency's decision. The agency may grant,

or the reviewing court may order, a stay upon terms which it deems proper.

(d) Within thirty (30) days after the service of the petition, or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(f) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant

have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) in violation of constitutional or statutory provisions;
- (2) in excess of the statutory authority of the agency;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
- (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (7) because findings of fact, upon issues essential to the decision, were not made although requested.

Section 309. APPEALS.

An aggrieved party may obtain review of a final judgment of a district court under this act by appeal to the supreme court within sixty (60) days after entry of judgment. Such appeal shall be taken in the manner provided by law for appeals from district courts in civil cases. Unless otherwise provided by statute or unless the agency has granted a stay through the completion of the judicial review process:

- (a) if appeal is taken from a judgment of the district court affirming an agency decision, the agency decision shall not be stayed except upon order of the supreme court; except that, in cases where a stay is in effect at the time of the filing of notice of appeal, the stay shall be continued by operation of law for twenty (20) days from the date of filing of the notice;

(b) if appeal is taken from a judgment of the district court reversing or modifying an agency decision, the agency decision shall be stayed pending final determination of the appeal unless the supreme court orders otherwise.

TITLE IV - GENERAL PROVISIONS

Section 401. DECLARATORY RULINGS BY AGENCIES.

Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. A declaratory ruling, or the refusal to issue such a ruling, shall be subject to judicial review in the same manner as decisions or orders in contested cases.

Section 402. DECLARATORY JUDGMENTS ON VALIDITY OR APPLICATION OF RULES.

The validity or application of a rule may be determined in an action for declaratory judgment if it is found that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The action may be brought in the district court for the county in which the plaintiff resides or has his principal place of business, or in which the agency maintains its principal office. The agency shall be made a party to the action. A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.

Section 403. SUBPOENAS AND ENFORCEMENT; COMPELLING TESTIMONY.

(a) An agency conducting any proceeding subject to this act shall have the power to require the furnishing of such information, the attendance of such witnesses, and the production of such books, records, papers, documents and other objects as may be necessary and proper for the purposes of the

proceeding. In furtherance of this power, an agency upon its own motion may, and upon request of any party appearing in a contested case shall, issue subpoenas for witnesses or subpoenas duces tecum. The method for service of subpoenas, witness fees and mileage shall be the same as required in civil actions in the district courts of the state. Except as otherwise provided by statute, witness fees and mileage shall be paid by the party at whose request the subpoena was issued.

(b) In case of disobedience of any subpoena issued and served under this section or of the refusal of any witness to testify as to any material matter with regard to which he may be interrogated in a proceeding before the agency, the agency may apply to any district court in the state for an order to compel compliance with the subpoena or the giving of testimony. If the agency fails or refuses to seek enforcement of a subpoena issued at the request of a party, or to compel the giving of testimony deemed material by a party, the party may make such application. The court shall hear the matter as expeditiously as possible. If the disobedience or refusal is found to be unjustified the court shall enter an order requiring compliance. Disobedience of such order shall be punishable by contempt of court in the same manner and by the same procedures as is provided for like conduct committed in the course of civil actions in district courts. If another method of subpoena enforcement or compelling testimony is provided by statute, it may be used as an alternative to the method provided for in this section.

Section 404. REPRESENTATION.

Any person compelled to appear in person or who voluntarily appears before any agency or representative thereof shall be accorded the right to be accompanied, represented and advised by counsel. In a proceeding

before an agency, every party shall be accorded the right to appear in person or by or with counsel.

Section 405. SERVICE.

Except where a statute expressly provides to the contrary, service in all agency proceedings subject to the provisions of this act and in proceedings for judicial review thereof, shall be as prescribed for civil actions in the district courts.

Section 406. CONSTRUCTION AND EFFECT.

Nothing in this act shall be deemed to limit or repeal additional requirements imposed by statute or otherwise recognized law. No subsequent legislation shall be deemed to supersede or modify any provision of this act, whether by implication or otherwise, except to the extent that such legislation shall do so expressly.

Section 407. REPEAL OF INCONSISTENT PROVISIONS.

All laws or parts of laws in conflict herewith are hereby repealed to the extent of such conflict.

Section 408. SEVERABILITY.

The provisions of this act are severable, and if any part or provision thereof shall be held void the decision of the court so holding shall not affect or impair any of the remaining parts or provisions of this act.

Section 409. TIME OF TAKING EFFECT.

This act shall take effect on July 1, 1971, except that pending proceedings shall not be affected.

* * *

UNIFORM LAW COMMISSIONERS'
REVISED MODEL STATE ADMINISTRATIVE
PROCEDURE ACT

The following is the text of the Revised Model State Administrative Procedure Act which was drafted by the National Conference of Commissioners on Uniform State Laws and approved at its Annual Conference during the summer of 1961.

AN ACT Concerning Procedure of State Administrative Agencies and Review of Their Determinations.

[Be it enacted.....]

SECTION 1. [Definitions.] As used in this Act:

- (1) "agency" means each state [board, commission, department, or officer], other than the legislature or the courts, authorized by law to make rules or to determine contested cases;
- (2) "contested case" means a proceeding, including but not restricted to ratemaking, [price fixing], and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing;
- (3) "license" includes the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law, but it does not include a license required solely for revenue purposes;
- (4) "licensing" includes the agency process respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license;
- (5) "party" means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party;
- (6) "person" means any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character other than an agency;

(7) "rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include (A) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public, or (B) declaratory rulings issued pursuant to Section 8, or (C) intra-agency memoranda.

SECTION 2 [Public Information; Adoption of Rules; Availability of Rules and Orders.]

(a) In addition to other rule-making requirements imposed by law, each agency shall:

(1) adopt as a rule a description of its organization, stating the general course and method of its operations and the methods whereby the public may obtain information or make submissions or requests;

(2) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency;

(3) make available for public inspection all rules and all other written statements of policy or interpretations formulated, adopted, or used by the agency in the discharge of its functions;

(4) make available for public inspection all final orders, decisions, and opinions.

(b) No agency rule, order, or decision is valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection as herein required. This provision is not applicable in favor of any person or party who has actual knowledge thereof.

SECTION 3. [Procedure for Adoption of Rules.]

(a) Prior to the adoption, amendment, or repeal of any rule, the agency shall:

(1) give at least 20 days' notice of its intended action. The notice shall include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, and the time when, the place where, and the manner in which interested persons may present their views thereon. The notice shall be mailed to all persons who have made timely request of the

agency for advance notice of its rule-making proceedings and shall be published in [here insert the medium of publication appropriate for the adopting state];

(2) afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing. In case of substantive rules, opportunity for oral hearing must be granted if requested by 25 persons, by a governmental subdivision or agency, or by an association having not less than 25 members. The agency shall consider fully all written and oral submissions respecting the proposed rule. Upon adoption of a rule, the agency, if requested to do so by an interested person either prior to adoption or within 30 days thereafter, shall issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the considerations urged against its adoption.

(b) If an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than 20 days' notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule. The rule may be effective for a period of not longer than 120 days [renewable once for a period not exceeding _____ days], but the adoption of an identical rule under subsections (a)(1) and (a)(2) of this Section is not precluded.

(c) No rule hereafter adopted is valid unless adopted in substantial compliance with this Section. A proceeding to contest any rule on the ground of non-compliance with the procedural requirements of this Section must be commenced within 2 years from the effective date of the rule.

SECTION 4. [Filing and Taking Effect of Rules.]

(a) Each agency shall file in the office of the [Secretary of State] a certified copy of each rule adopted by it, including all rules existing on the effective date of this Act. The [Secretary of State] shall keep a permanent register of the rules open to public inspection.

(b) Each rule hereafter adopted is effective 20 days after filing, except that:

(1) if a later date is required by statute or specified in the rule, the later date is the effective date;

(2) subject to applicable constitutional or statutory provisions, an emergency rule becomes effective immediately upon filing with the [Secretary of State], or at a stated date less than 20 days thereafter, if the agency finds that

this effective date is necessary because of imminent peril to the public health, safety, or welfare. The agency's finding and a brief statement of the reasons therefor shall be filed with the rule. The agency shall take appropriate measures to make emergency rules known to the persons who may be affected by them.

SECTION 5. [Publication of Rules.]

(a) The [Secretary of State] shall compile, index and publish all effective rules adopted by each agency. Compilations shall be supplemented or revised as often as necessary [and at least once every 2 years].

(b) The [Secretary of State] shall publish a [monthly] bulletin setting forth the text of all rules filed during the preceding [month] excluding rules in effect upon the adoption of this Act.

(c) The [Secretary of State] may omit from the bulletin or compilation any rule the publication of which would be unduly cumbersome, expensive, or otherwise inexpedient, if the rule in printed or processed form is made available on application to the adopting agency, and if the bulletin or compilation contains a notice stating the general subject matter of the omitted rule and stating how a copy thereof may be obtained.

(d) Bulletins and compilations shall be made available upon request to [agencies and officials of this State] free of charge and to other persons at prices fixed by the [Secretary of State] to cover mailing and publication costs.

SECTION 6. [Petition for Adoption of Rules.] An interested person may petition an agency requesting the promulgation, amendment, or repeal of a rule. Each agency shall prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition. Within 30 days after submission of a petition, the agency either shall deny the petition in writing (stating its reasons for the denials) or shall initiate rule-making proceedings in accordance with Section

SECTION 7. [Declaratory Judgment on Validity or Applicability of Rules.] The validity or applicability of a rule may be determined in an action for declaratory judgment in the [District Court of . . . County], if it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The agency shall be made a party to the action. A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.

SECTION 8. [Declaratory Rulings by Agencies.] Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. Rulings disposing of petitions have the same status as agency decisions or orders in contested cases.

SECTION 9. [Contested Cases; Notice; Hearing; Records.]

(a) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

(b) The notice shall include:

- (1) a statement of the time, place, and nature of the hearing;
- (2) a statement of the legal authority and jurisdiction under which the hearing is to be held;
- (3) a reference to the particular sections of the statutes and rules involved;
- (4) a short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter upon application a more definite and detailed statement shall be furnished.

(c) Opportunity shall be afforded all parties to respond and present evidence and argument on all issues involved.

(d) Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

(e) The record in a contested case shall include:

- (1) all pleadings, motions, intermediate rulings;
- (2) evidence received or considered;
- (3) a statement of matters officially noticed;
- (4) questions and offers of proof, objections, and rulings thereon;
- (5) proposed findings and exceptions;
- (6) any decision, opinion, or report by the officer presiding at the hearing;

(7) all staff memoranda or data submitted to the hearing officer or members of the agency in connection with their consideration of the case.

(f) Oral proceedings or any part thereof shall be transcribed on request of any party.

(g) Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

SECTION 10. [Rules of Evidence; Official Notice.] In contested cases:

(1) irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in [non-jury] civil cases in the [District Courts of this State] shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form;

[(2) documentary evidence may be received in the form of copies or excerpts, if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original;]

(3) a party may conduct cross-examinations required for a full and true disclosure of the facts;

(4) notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed. The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.

SECTION 11. [Examination of Evidence by Agency.] When in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served upon the parties, and an opportunity is afforded

to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision. The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact or law necessary to the proposed decision, prepared by the person who conducted the hearing or one who has read the record. The parties by written stipulation may waive compliance with this section.

SECTION 12. [Decisions and Orders.] A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. Parties shall be notified either personally or by mail of any decision or order. Upon request a copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.

SECTION 13. [Ex Parte Consultations.] Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. An agency member

- (1) may communicate with other members of the agency, and
- (2) may have the aid and advice of one or more personal assistants.

SECTION 14. [Licenses.]

(a) When the grant, denial, or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this Act concerning contested cases apply.

(b) When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

(c) No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave

notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

SECTION 15. [Judicial Review of Contested Cases.]

(a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this Act. This Section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(b) Proceedings for review are instituted by filing a petition in the [District Court of the _____ County] within [30] days after [mailing notice of] the final decision of the agency or, if a rehearing is requested, within [30] days after the decision thereon. Copies of the petition shall be served upon the agency and all parties of record.

(c) The filing of the petition does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.

(d) Within [30] days after the service of the petition, or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing court.

(f) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in the procedure before the agency, not shown in the record, proof thereon may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) in violation of constitutional or statutory provisions;
- (2) in excess of the statutory authority of the agency;
- (3) made upon unlawful procedure;
- (4) affected by other error of law;
- (5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

[SECTION 16. [Appeals.] An aggrieved party may obtain a review of any final judgment of the [District Court] under this Act by appeal to the [Supreme Court]. The appeal shall be taken as in other civil cases.]

[SECTION 17. [Severability.] If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and for this purpose the provisions of this Act are severable.]

SECTION 18. [Repeal.] The following acts and parts of acts are repealed:

- (1) ;
- (2) ;
- (3) .

SECTION 19. [Time of Taking Effect and Scope of Application.] This Act takes effect.....and (except as to proceedings then pending) applies to all agencies and agency proceedings not expressly exempted.

Thirty-sixth Montana Legislative Assembly (1959)

TITLE I--GENERAL PROVISIONS

Section 101. Short title. This act may be cited as the Administrative Procedure Act.

Section 102. Definitions. For the purpose of this Act:

(a) "Agency" means any board, commission, department, officer, or other authority of the State government, whether or not having state-wide jurisdiction, authorized by law to make rules or to determine the legal rights, duties, or privileges of specific parties, except those in the legislative or judicial branches, and except any such agencies to the extent that they are concerned with the militia, with admission to and management of educational, penal or charitable institutions, with probation, parole, or pardons, or with public assistance.

(b) "Rule" includes every regulation, standard, or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, adopted by an agency, whether with or without prior hearing, to implement or make specific the law enforced or administered by it or to govern its organization or procedure, and includes the approval or prescription for the future of rates, wages, prices, facilities, services, or allowances therefor, but does not include regulations concerning only the internal management of the adopting agency or any other agency and not directly affecting the rights of or procedures available to the public. "Rule making" means any agency process for the adoption, amendment, or repeal of a rule.

(c) "Contested case" means a proceeding before an agency, in any matter other than rule making, in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after opportunity for an agency hearing. "Contested case" includes proceedings to determine whether an agency shall impose any form of penalty, including publication of reports that specific parties have violated statutes or rules, and includes licensing, but does not include proceedings in which agency decisions rest solely on inspections, tests, or elections. Except for the purposes of Section 306, "contested case" includes proceedings to determine whether an agency shall institute or recommend institution of court proceedings.

(d) "License" means the whole or part of any agency permit, certificate, approval, registration, charter, membership, authority, or other form of permission required by law. "Licensing" means any agency process respecting the grant, renewal, modification, limitation, suspension, revocation, or denial of a license.

(e) "Person" includes individuals, partnerships, corporations, associations, and public or private organizations of any character.

Section 103. Appearance and representation. Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel. In any agency proceeding every party shall be accorded the right to appear in person or by or with counsel.

Section 104. Service. Except where statutes otherwise specifically provide, service in all agency proceedings subject to the provisions of this Act, and in proceedings for the judicial review thereof, shall be as prescribed by this Code for service in civil actions.

Section 105. Licenses. (a) In any case in which application is made for a license, the agency, with due regard to the rights or privileges of all interested parties and adversely affected persons, shall with reasonable promptness set and complete any hearings or other proceedings required by law, make its decision, and notify the applicant and all other interested parties.

(b) Except in cases of willfulness or those in which public health or safety requires otherwise, no agency may suspend or revoke any license unless, prior to such suspension or revocation, the agency in writing brings to the attention of the licensee facts or conditions which may warrant such action and accords the licensee an opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application has been finally determined by the agency. This sub-section shall not apply:

(1) where the agency is required by statute to suspend, revoke, or refuse to renew a license, without exercising any discretion in the matter, on the basis of a court conviction or judgment; or

(2) where the suspension, revocation, or refusal to renew is based solely upon failure of the licensee to file timely reports or schedules, or to pay lawfully prescribed fees, or to maintain insurance coverage as required by any statute or rule.

Section 106. Petition for declaratory rulings by agencies. (a) On petition of any interested person, any agency may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it. A declaratory ruling, if issued after argument and stated to be binding, is binding between the agency and the petitioner on the state of facts alleged, unless it is altered or set aside by a court, or by the agency with the consent of the petitioner. Such a ruling is subject to judicial review in the manner provided in this Act for the review of decisions in contested cases.

(b) Petitions for declaratory rulings shall contain a reference to the rule or statute with respect to which the declaratory ruling is requested, a concise statement of facts describing the situation as to which the declaratory ruling is requested, and the reasons for the requested ruling.

(c) Within a reasonable time after receipt of a petition pursuant to this section, an agency shall either deny the petition in writing or schedule the matter for hearing and afford full opportunity for hearing to all interested parties. If the agency denies the petition, it shall promptly notify the petitioner of its decision, including a brief statement of the reasons therefor.

Section 107. Denials. Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding subject to this Act. Except (1) in affirming a prior denial or where the denial is self-explanatory, or (2) where Section 305 of this Act applies, such notice shall be accompanied by a simple statement of procedural or other grounds.

TITLE II -- RULES

Section 201. Adoption of rules. In addition to other rule-making requirements imposed by law:

(a) (1) Each agency shall adopt rules governing the formal and informal procedures prescribed or authorized by this Act, and no person shall in any manner be required to resort to procedures not so adopted. Such rules shall include rules of practice before the agency, together with forms and instructions.

(2) The Attorney General shall prepare and file with the Secretary of State model rules of procedure appropriate for use by as many agencies as possible. Any agency may adopt all or part of the model rules by reference. Notice of such adoption shall be filed and the model rules or parts thereof

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(b) Petitions for declaratory rulings shall contain a reference to the rule or statute with respect to which the declaratory ruling is requested, a concise statement of facts describing the situation as to which the declaratory ruling is requested, and the reasons for the requested ruling.

(c) Within a reasonable time after receipt of a petition pursuant to this section, an agency shall either deny the petition in writing or schedule the matter for hearing and afford full opportunity for hearing to all interested parties. If the agency denies the petition, it shall promptly notify the petitioner of its decision, including a brief statement of the reasons therefor.

Section 107. Denials. Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding subject to this Act. Except (1) in affirming a prior denial or where the denial is self-explanatory, or (2) where Section 305 of this Act applies, such notice shall be accompanied by a simple statement of procedural or other grounds.

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(2) The Attorney General shall prepare and file with the Secretary of State model rules of procedure appropriate for use by as many agencies as possible. Any agency may adopt all or part of the model rules by reference. Notice of such adoption shall be filed and the model rules or parts thereof

(e) Rules shall not unnecessarily repeat statutory language. Whenever it is necessary to refer to statutory language in order to convey the meaning of a rule interpreting that language, the reference shall clearly indicate the portion of the language which is statutory and the portion which is the amplification of that language. Each rule shall include a citation of the authority pursuant to which it, or any part thereof, is adopted and, if an amendment, a reference to the original rule.

Section 202. Emergency rules. If an agency finds that immediate adoption of a rule is necessary for the preservation of the public health, safety, or welfare, the agency may adopt such a rule without notice as an emergency rule. The agency's finding and a brief statement of the reasons for its finding shall be incorporated in the rule. The agency shall file the rule as provided in Section 203 of this Act, and shall take such other steps as may be feasible to make the rule known to persons who will be affected by it. An emergency rule becomes effective immediately on filing, or on such later date as is specified in the rule, but may not remain in effect longer than sixty days.

Section 203. Filing and effective date of rules. Each agency shall file with the Secretary of State a certified copy of each rule adopted by it subsequent to the effective date of this Act. Each such rule shall become effective ten days after publication thereof, or publication of notice of adoption thereof, as provided in Section 205 of this Act, except:

(1) Rules as to which a later date is required by statute or specified in the rule;

(2) Rules served upon all persons subject thereto, which may be made effective ten days after such service;

(3) Emergency rules adopted pursuant to Section 202 of this Act;

(4) Rules relating to the use of public works, including streets and highways, when the substance of such rules is indicated to the public by means of signs and signals, which may be made effective immediately on filing;

(5) Rules designed solely to bring the language of an existing rule into conformity with a statute changed or adopted since the adoption of the rule, to bring the language of an existing rule into conformity with a controlling judicial decision, or to comply with a federal requirement, which may be made effective immediately on filing;

(6) Rules governing hunting and fishing, which may be effective immediately on filing.

The Secretary of State is authorized to prescribe rules governing the format, style, and arrangement of rules filed with him, and may refuse to accept for filing any rule that is not in substantial compliance with such rules. He shall keep a permanent register of rules filed with him, which shall be open to public inspection, and shall furnish certified copies of any rule on request of any person, on payment of cost.

Section 204. Filing of existing rules. On or before December 1, 1959, each agency shall file with the Secretary of State a certified copy of each rule adopted by it on or before the effective date of this Act and remaining in effect. Any rule not so filed shall be deemed to have been abrogated by the agency and shall be void and of no effect.

Section 205. Publication of rules and notices. --(a) The Secretary of State shall, as soon as practicable after the effective date of this Act, compile, index, and publish in bound form the text of all rules adopted by each agency and remaining in effect. This compilation shall be entitled the "Montana Administrative Code" (hereinafter referred to as the Code), shall be revised as often as necessary and at least once every five years, and shall be supplemented by a cumulative annual supplement in pocket part form.

(b) The Secretary of State shall publish a monthly bulletin, to be entitled the "Montana Administrative Register" (hereinafter referred to as the Register), in which he shall set forth the text of all rules filed during the preceding month, excluding rules in effect on the effective date of this Act. Each issue of the Register shall also contain a notice section in which shall be published the text of all notices of proposed rule-making filed during the preceding month, except that if an agency certifies that it has served a notice on all persons who will be subject to a proposed rule, or that it has otherwise made publication of a notice pursuant to specific statutory requirements, the notice may be published in abbreviated form.

(c) The Secretary of State, with the approval of the adopting agency, may omit the following rules from the Code or the Register, or from both of them, if such rules are made available in printed or processed form on application to the adopting agency, and if the publication from which they are omitted contains a notice stating the general subject matter of the rules so omitted and stating where such rules may be inspected and how copies may be obtained:

(1) Rules relating to the use of public works, including streets and highways, when the substance of such rules is indicated to the public by means of signs or signals;

(2) Rules and standards established by the federal government or by technical societies or organizations of recognized national standing, incorporated by reference in an agency's rules without reproduction in full, where the rules or

standards so incorporated are of limited public interest;

(3) Rules which an agency certifies it has served upon all persons subject thereto;

(4) Rules governing hunting and fishing.

Section 206. Distribution of rules. The Secretary of State shall distribute copies of each issue of the Code and Register without charge as follows:

Each agency filing rules under this Act, 1 copy

Attorney General, 1 copy

Clerk of each court of record of this State, 1 copy

Clerk of United States District Court for the District of Montana, 1 copy

Clerk of United States Court of Appeals for the Ninth Circuit, 1 copy

Each county attorney of this State, 1 copy

Each county clerk of this State, for use of county officials and the public, 1 copy

State Law Library, 1 copy

State Historical Society, 1 copy

Each unit of the University of Montana, 1 copy

Law Library of Montana State University, 1 copy

Secretary of Senate of this State, 1 copy

Chief Clerk of House of Representatives of this State, 1 copy

Library of Congress, 1 copy

State Law Library, for such exchanges as it may establish with libraries of other states, not to exceed 50 copies

Law Library of Montana State University, for such exchanges as it may establish with institutions of higher education in other states, not to exceed 50 copies. He shall make copies of or subscriptions to the Code and Register available to other persons at prices fixed to cover publication and mailing costs, and shall distribute copies of the notice section of the Register without charge to any person on request.

Any agency may arrange to obtain reprints of portions of the Code or Register containing its rules and distribute them at cost, or at less than cost if otherwise so authorized.

Section 207. Petition for adoption of rules. Any interested person may petition an agency requesting the promulgation, amendment, or repeal of any rule. Within a reasonable time after the receipt of such a petition, an agency shall either deny the petition in writing, with a brief statement of its reasons for the denial, or proceed with the requested rule making. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition.

Section 208. Judicial notice of rules. -- The courts shall take judicial notice of any rule duly filed and published under the provisions of this Act.

Section 209. Declaratory judgment on validity of rules. -- (a) The validity of any rule may be determined upon petition for a declaratory judgment thereon, when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner. The petition shall be addressed to the district court for the county in which the petitioner resides or had his principal place of business, or in which the agency maintains its principal office. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

(b) The court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rule-making procedures.

(c) This section is in addition to and not in substitution for remedies otherwise available.

TITLE III -- CONTESTED CASES

Section 301. Contested cases; notice, hearing, record. -- In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice, which shall in no case be less than ten days. The notice shall state the time, place and issues involved, but if, by reason of the nature of the proceeding, the issues cannot be fully stated in advance of the hearing, or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable, and opportunity shall be afforded all parties to present oral and documentary evidence, briefs, and oral argument with respect thereto. Any agency officer authorized to hold or participate in the holding of hearings may administer oaths or affirmations and take depositions in contested cases. In each contested case the agency shall prepare an official record, which shall include the testimony and exhibits and all pleadings and other documents filed by parties or by the agency, but it shall not be necessary to transcribe shorthand notes or sound recordings unless requested for purposes of rehearing or court review. The agency shall furnish copies of the transcript of record to any party on payment of a uniform charge fixed by the agency or otherwise prescribed by law. Informal disposition may also be made of any contested case by stipulation, agreed settlement, consent order, or default. Each agency shall adopt appropriate rules of procedure for notice and hearing in contested cases.

Section 302. Subpoenas. (a) Agencies authorized by law to issue subpoenas, including subpoenas duces tecum, shall issue such subpoenas to any party to a contested case upon request and, to the extent required by agency rule, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Witness fees and mileage shall be the same as provided for witnesses in the district courts, and except as otherwise provided by law shall be paid by the party at whose request the subpoena was issued.

(b) Except where a different method of enforcement is prescribed by statute: In case of failure or refusal on the part of any person to comply with an agency subpoena, or in case of the refusal of any witness to testify as to any material matter regarding which he may be interrogated, any district court in this State, upon good cause shown by the application of the agency, may issue a warrant of attachment for such person and if after hearing the court finds his failure or refusal to be unjustified, compel him to comply with such subpoena, and to attend before the agency and produce any subpoenaed records, books, and documents for examination, and to give his testimony. Such court shall have the power to punish for contempt as in the case of disobedience to a like subpoena issued by the court, or for refusal to testify therein.

Section 303. Rules of evidence; official notice.-- In contested cases:

(1) Agencies shall not be bound by common law or statutory rules of evidence. They may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable prudent men in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence. Hearsay evidence may be admitted for the purpose of supplementing or explaining any direct evidence, but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

(2) All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence may be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

(3) Every party shall have the right of cross-examination of witnesses, which shall include the right to cross-examine the author of any document prepared by or on behalf of or for the use of the agency and offered in evidence, and shall have the right to submit rebuttal evidence.

(4) Agencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge. Parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so notice. Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them.

Section 304. Examination of evidence by agency. Whenever in a contested case a majority of the officials of the agency who are to render the final decision have not heard or read the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision, including findings of fact and conclusions of law, has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of the officials who are to render the decision, who shall personally consider the whole record or such portion thereof as may be cited by the parties. The parties may by written stipulation waive compliance with this section.

Section 305. Decisions and orders. Every decision and order rendered by an agency in a contested case shall be in writing or stated in the record and shall be served forthwith on each party or his attorney of record. Every agency shall index and make available to public inspection all decisions and orders in contested cases. If such decision or order is adverse to a party to the proceeding, it shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. If a statute or rule affords a right of or right to request rehearing, reconsideration, or appeal within the agency, the decision or order shall also be accompanied by a notice of such right and of the time limits thereon.

Section 306. Judicial review of contested cases. -- (a) Right of review. Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, is entitled to judicial review thereof under this Act, and no other statutory, equitable, or common law mode of review shall be available therefor except to the extent that the decision may be reviewed in civil or criminal proceedings for the enforcement thereof. This section shall not apply to decisions as to which statutes preclude judicial review, to decisions of the Industrial Accident Board, the Oil and Gas Conservation Commission, or the Board of Railroad Commissioners, or to decisions of the State Board of Equalization relating to taxes or license fees.

Where a statute or rule requires or permits an application for a rehearing or other method of review by an agency, and an application for such rehearing or review is made, no decision of such agency shall be final as to the party applying therefor until such rehearing or review is had or denied. If under the terms of a statute governing procedure before an agency a decision has become final because of failure to file any document in the nature of objections, protests, petition for hearing or application for agency review within the time allowed by such statute, such decision shall not be subject to judicial review hereunder excepting only for the purpose of questioning the jurisdiction of the agency over the person or subject matter.

A party who proceeded before an agency under the terms of a particular statute shall not be precluded from questioning the validity of that statute on judicial review, but such party may not raise any other question not raised before the agency unless allowed by the court upon due cause shown.

(b) Institution of review proceedings. Proceedings for review shall be instituted by filing a petition in the district court within thirty days after the service of the final decision of the agency. Except where statutes otherwise provide, the petition shall be filed in the district court for the county where the petitioner resides or has his principal place of business, or where the agency maintains its principal office. The petition shall include a concise statement of the facts upon which jurisdiction and venue are based, facts showing that the petitioner is aggrieved, and the ground or grounds specified in subsection (g) of this section upon which petitioner contends he is entitled to relief. The petition shall demand the relief to which petitioner believes he is entitled, which demand may be in the alternative. Copies of the petition shall be served upon the agency and all other parties of record, and summons shall issue as in other civil actions. The court, in its discretion, may require petitioner to execute a bond with sufficient sureties, in such amount and upon such conditions as the court may direct, or to file a deposit in lieu thereof. The court, in its discretion, may permit other interested persons to intervene.

(c) Stay. The filing of the petition shall not stay enforcement of the agency decision; but the agency may do so, or the reviewing court may order a stay upon such terms as it deems proper.

(d) Record on review. Within thirty days after service of the petition, or within such further time as the court may allow, the agency shall transmit to the reviewing court the original or a certified copy of the record of the proceeding under review. The record shall consist of (1) the entire official record as specified in Section 301 of this Act, or (2) such portions thereof as the agency and the parties may stipulate, or (3) a statement of the case agreed to by the agency and the parties. The court may require or permit subsequent corrections or additions to the record when deemed desirable. The expense of preparing and filing the record shall be taxed as a part of the costs and charged against the losing party, except where statutes otherwise specifically provide and except that any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional expense caused by such refusal.

(e) Additional evidence. If, before the date set for hearing, application is made to the court for leave to present additional evidence to the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional

evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and decision by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

(f) Mode of review. The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court. The court shall, upon request, hear oral argument and receive written briefs.

(g) Scope of review. The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) in violation of constitutional provisions ; or
- (2) in excess of the statutory authority or jurisdiction of the agency; or
- (3) made upon unlawful procedure; or
- (4) affected by other error of law; or
- (5) unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or
- (6) arbitrary or capricious or in abuse of discretion.

(h) Unreasonable delay. Unreasonable delay on the part of any agency in deciding a contested case shall be grounds for an order of the court compelling action by the agency or removing the case to the court for decision.

Section 307. Appeals. An aggrieved party may secure a review of any final judgment of the district court under this Act by appeal to the Supreme Court within sixty days after entry of the judgment. Such appeal shall be taken in the manner provided by law for appeals from the district court in other civil cases. If appeal is taken from a judgment of the district court affirming an agency decision, the agency decision shall not be stayed except upon the order of the Supreme Court, except that, in cases where a stay is in effect at the time of filing the notice of appeal, the stay shall be continued by operation of law for twenty days from the filing of the notice. If appeal is taken from a judgment of the district court reversing or modifying an agency decision, the agency decision shall be stayed pending final determination of the appeal unless the Supreme Court otherwise orders.

TITLE IV -- AMENDMENTS TO EXISTING LAWS

(Omitted)

TITLE V -- CONSTRUCTION AND EFFECT

Section 501. Construction and effect. Nothing in this Act shall be deemed to limit or repeal additional requirements imposed by statute or otherwise recognized by law. No subsequent legislation shall be deemed to supersede or modify any provision of this Act, whether by implication or otherwise, except to the extent that such legislation shall do so expressly.

Section 502. Severability. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Section 503. Repeal. All acts or parts of acts which are inconsistent with the provisions of this Act are hereby repealed.

Section 504. Time of taking effect. This Act shall take effect July 1, 1959, except that pending proceedings shall not be affected.

